
“IMMIGRATION LAW SERIES: APPELLATE ADJUDICATION PART I”

Wednesday, September 21, 2016
U.S. Department of Justice
Executive Office for Immigration Appeals
Board of Immigration Appeals
Falls Church, VA 22041

AGENDA

This session will be held in the K.D. Rooney Training Center (Tower - 18th Floor)

WHO ARE YOU? IDENTITY ISSUES IN IMMIGRATION

9:30 – 9:45 a.m. Registration

9:45 – 10:00 a.m. Introduction
*Garry Malphrus, Moderator
Board Member
U.S. Department of Department
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041*

10:00 – 10:05 a.m. Distinction Between Identity and Alienage
*S. Kathleen Pepper, Speaker
Federal Court Remand Coordinator/Attorney Advisor
U.S. Department of Department
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041*

10:05 – 10:20 a.m. Identity and Designation of Country(ies) of Removal
S. Kathleen Pepper, Speaker

10:20 – 10:35 a.m. Identity and Credibility
S. Kathleen Pepper, Speaker

10:35 – 10:45 a.m. Break (NO CLE CREDIT)

10:45 – 11:00 a.m. Identity and Corroboration
S. Kathleen Pepper, Speaker

11:00 – 11:10 a.m. Identity and Asylum
S. Kathleen Pepper, Speaker

11:10 – 11:25 a.m. Identity and Custody/Detained Issues
*Joseph Hassell, Speaker
Attorney Advisor
U.S. Department of Department
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, VA 22041*

11:25 – 11:30 a.m. Identity Verification Process (NO CLE CREDIT)

Joseph Hassell, Speaker

11:30 – 11:50 a.m. Panel and Audience Discussion

Garry Malphrus, Speaker

This presentation will examine issues regarding an alien's identity in immigration proceedings which arise in credibility determinations, designation of a country of removal, and asylum eligibility. The training will explore the distinction between alienage and identity. In addition, the session will cover identity issues which arise in detained settings, such as custody determinations and habeas petitions. An overview of how the Department of Homeland Security verifies identities in immigration proceedings will also be addressed.

Learning Objectives

By the completion of this session, attendees should:

- Know how identity issues affect credibility determinations, designation of a country of removal or asylum eligibility;
- Be familiar with the distinction between alienage and identity;
- Know how identity issues may differ in detained settings;
- Understand federal courts concerns regarding identity issues in a variety of immigration contexts; and
- Know how the Department of Homeland Security verifies identities of aliens in immigration proceedings.

GOVERNMENT ETHICS FOR IMMIGRATION APPEALS ADJUDICATORS

1:30 – 1:35 p.m. Introduction to Government Ethics

*Chris Cox, Speaker
Associate General Counsel for Ethics
U.S. Department of Department
Executive Office for Immigration Review
Office of General Counsel
Falls Church, VA 22041*

1:35 – 1:50 p.m. Standards of Ethical Conduct for Executive Branch Employees and Supplemental Standards of Ethical Conduct for DOJ Employees

Chris Cox, Speaker

1:50 – 2:05 p.m. Restrictions that Apply to Executive Branch and DOJ Attorneys

Chris Cox, Speaker

2:05 – 2:20 p.m. Government Ethics Issues in the Workplace

Chris Cox, Speaker

2:20 – 2:30 p.m. Panel and Audience Discussion

Chris Cox, Speaker

This presentation will explore the Standards of Ethical Conduct for employees of the Executive Branch and the Supplemental Standards of Ethical Conduct for Employees of the Department of Justice, as set forth in Title 5 of the Code of Federal Regulations. The session will cover such issues as restrictions on the receipt of gifts, misuse of official title and position, membership in professional organizations, and restrictions on outside employment and other activities. The session will utilize both hypothetical and real-life examples to demonstrate the application of the Standards of Conduct.

Learning Objectives

By the end of this session, attendees should be able to:

- Understand the Standards of Ethical Conduct governing employees of the Executive Branch and the Supplemental Standards of Ethical Conduct for Employees of the Department of Justice.
- Understand the restrictions that apply to Executive Branch and Department of Justice attorneys on issues such as restrictions on the receipt of gifts, misuse of official title and position, membership in professional organizations, and restrictions on outside employment and other activities.
- Understand how to apply the Standards of Ethical Conduct governing employees of the Executive Branch and the Supplemental Standards of Ethical Conduct for Employees of the Department of Justice when confronted with government ethics issues in the workplace.

Who are You? – Identity Issues in Immigration: Board Precedent Case Summaries

by

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&

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Board of Immigration Appeals

BIA Training & Development Program

September 21, 2016

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**All cases involve pre-REAL ID Act credibility standards*

Matter of C-C-I-, 26 I&N Dec. 375, 384 (BIA 2014).

Focus issues: Identity and credibility, corroboration.

In 1999, the alien testified that he was a Nigerian national, and in 2012, he testified that he was a Gambian national. *Id.* at 382. He explained he was unaware until 2002 that he was born in the Gambia, but he also testified that he knew as early as 1982 that he could not obtain a legal Nigerian passport or birth certificate, and he admitted he had used a Nigerian passport to travel for purpose other than fleeing persecution. *Id.* The IJ found the alien did not submit a valid identity document to establish his identity, and the IJ based an adverse credibility finding in part on the alien’s inability to establish his identity or nationality. *Id.* The IJ ordered the alien removed to Nigeria. *Id.* at 376. The Board affirmed the adverse credibility determination due to the lack of credible testimony and corroborating evidence, and the Board denied protection under CAT with regard to Nigeria. *Id.* at 382–84.

Matter of M-D-, 21 I&N Dec. 1180 (BIA 1998).

Focus issue: Identity and corroboration.

The alien testified that he was a half-black Mauritanian national of the Peurh ethnic group whose identity documents were destroyed by members of the Mauritanian military. *Id.* at 1180. He submitted country conditions information indicating black Mauritians were oppressed in Mauritania. *Id.* at 1180–81, 1183. The alien claimed he lost his refugee card. *Id.* at 1184. The IJ provided the alien a continuance of 7 weeks to provide documentation from UNHCR regarding the presence of the alien’s family in the refugee camp, but the alien did not submit any such evidence. *Id.* at 1184. The IJ determined the alien did not meet his burden of proof in establishing his claims for asylum and withholding of deportation in part because he had no corroborating evidence that he was a Mauritanian citizen. *Id.* at 1181.

The Board upheld the IJ’s determination due to “the complete lack of evidence corroborating” his identity, nationality, or claim of persecution. *Id.* at 1184. The Board acknowledged that detailed, consistent, plausible testimony alone can be sufficient if it is the only evidence available, but it also stated corroborating evidence should be provided where reasonably available. *Id.* at 1182–83. The Board reasoned that the alien did not obtain new identity documents or explain why they were not available, and he did not provide documents regarding his family’s presence in the refugee camp or letters from his family that could be reasonably expected to corroborate his story. *Id.* at 1183–84.

DISSENT (Chairman Schmidt): The dissent concluded the alien met the burden of proof because he provided specific, detailed, plausible, consistent testimony. *Id.* at 1185–87. The opinion reasoned that the absence of a document verifying the alien’s, or his family’s, presence at the refugee camp did not establish he was not there, as there was no basis for concluding such a document was readily available. *Id.* at 1187–88. The dissent noted a U.S. Department of State

Country Profile suggested some Mauritanians faced difficulty in obtaining identity documents. *Id.* at 1188. The opinion also noted the absence of a letter from the alien's sister did not undermine his claim, as the alien was not asked to explain why he did not submit a letter she sent and nothing in the record suggested his sister was able to send a letter on her own. *Id.* at 1189.

DISSENT (Board Member Rosenberg): The opinion concluded that the alien met his burden of proof, and it reasoned the majority's decision contravened Second Circuit case law and Board precedent that contemplated the sufficiency of testimony in sustaining the burden of proof without corroboration. *Id.* at 1189–91. The dissent reasoned that the alien provided specific, detailed, uncontested testimony consistent with the country conditions evidence, and persuasive evidence indicated refugee camp identity documents were difficult to obtain. *Id.* at 1192–94, 1196. The opinion also noted that the alien provided explanations for why he did not have letters from his family. *Id.* at 1194. The dissent reasoned that the majority applied the wrong standard in expecting the “functionally illiterate” alien to provide identity documents or corroborating letters from family members. *Id.* at 1195.

Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998).

Focus issue: Identity and corroboration.

The alien claimed to be a Mauritanian citizen who was persecuted by white Maurs and was forced to go to a refugee camp in Senegal. *Id.* at 1136. He submitted a copy of his Mauritanian identity card and explained the original was stolen after he arrived in the United States. *Id.* at 1138. He also submitted the original of his mother's Mauritanian identity card, which he stated he brought in case his own card was lost. *Id.* After the alien provided testimony, the IJ twice continued the case to give the alien an opportunity to provide confirmation of his stay in the refugee camp. *Id.* at 1139. The alien submitted a letter from the UNHCR office in Senegal, and the IJ accorded minimal weight to the letter because it named a different individual and the alien's initial request to UNHCR was not included. *Id.* at 1138. The IJ did not make an adverse credibility finding but denied the alien's applications for asylum and withholding of deportation because the alien's testimony lacked detail regarding key elements and the alien failed to provide corroborating evidence. *Id.* at 1138–39.

In affirming the IJ's decision, the Board held that where specific, detailed, and credible testimony was not available, a combination of detailed testimony and corroborative evidence was needed to establish an asylum claim. *Id.* at 1139. The Board also noted that in cases in which there was ambiguity regarding a claim, the Board may consider extending the alien the “benefit of the doubt,” but this case did not involve such an ambiguity. *Id.*

CONCURRENCE: The opinion explained that it was reasonable in light of some aspects of the alien's testimony for the IJ to request additional evidence regarding the alien's alleged stay at the refugee camp. *Id.* at 1140–41. The opinion noted the IJ provided a generous amount of time to obtain evidence that appeared to be reasonably available, and the alien did not argue the request or time frame to submit the evidence was unreasonable. *Id.* at 1141–42. The opinion reasoned it was not the absence of corroborating evidence, but the lack an explanation for its absence, that was significant. *Id.* at 1142. The concurrence would not extend “the benefit of the doubt” where

the alien provided no explanation, as it was the alien's burden to establish eligibility for relief. *Id.* at 1143.

DISSENT: The dissent would have found the alien met his burden of proof where the IJ made no adverse credibility finding and the alien provided significant testimonial detail, particularly in light of evidence indicating the detail was uneducated and illiterate. *Id.* at 1145–47. The dissent also noted the fact that the alien's identity document was issued in different city than where the alien lived and claimed to obtain his document was not necessarily contradictory. *Id.* at 1148. The opinion noted the substance of the alien's claim was supported by country conditions evidence. *Id.* The opinion reasoned that before and IJ relied on the perceived absence of specificity, the IJ should have asked for more details. *Id.* at 1154. The opinion concluded the alien was entitled to the "benefit of the doubt" in this case. *Id.* at 1155–56.

Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998).

Focus issues: Identity and credibility, corroboration, country of removal.

The alien submitted an identity card and birth extract purportedly from Mauritania and claimed to be a native and citizen of Mauritania. *Id.* at 1079. INS submitted a report from its Forensics Document Laboratory ("FDL") that stated the identity card was counterfeit and the birth extract was "probably counterfeit." *Id.* The IJ determined the submission of at least one fraudulent document generally discredited the alien's testimony as to asylum eligibility and specifically discredited the alien's claimed identity. *Id.* at 1082. The IJ denied the alien's applications for asylum and withholding of deportation. *Id.*

In affirming the IJ's decision, the Board stated the alien had "the burden of establishing identity, nationality, and citizenship" to support his fundamental claim for refuge from Mauritania. *Id.* at 1081. The Board distinguished the use of a fraudulent document in Immigration Court to apply for relief from using a fraudulent document in other contexts, such as escaping immediate danger or gaining entry into the United States. *Id.* The Board drew adverse inferences from the alien's attempt to establish identity and nationality through flawed and missing corroborating documents and from his failure to refute or explain the FDL report's conclusions. *Id.* at 1081, 1084.

The Board reasoned the alien's fraud in the present case was analogous to the material misrepresentations in *Ceballos-Castillo v. INS*, 904 F.2d 519 (9th Cir. 1990) (upholding an adverse credibility finding where the alien made inconsistent statements about the identity of his alleged persecutors and where the persecutors' identity went to the heart of his claim). *Matter of O-D-*, 21 I&N Dec. at 1082. In determining the fraud undermined the alien's credibility, the Board noted the alien's identity was "perhaps the most critical of elements" of his asylum claim. *Id.* In rejecting the alien's argument that the FDL report was unreliable, the Board noted the record contained no evidence calling the report into question. *Id.* at 1083. The Board disagreed with the IJ's statements to the extent they appeared to recognize the alien's nationality and citizenship. *Id.* at 1084, 1099. The Board made an adverse credibility finding and concluded the alien failed to meet his burden of proof to establish his identity, nationality, and citizenship. *Id.* at 1085. Accordingly, the Board denied the alien's claims for asylum and withholding of deportation. *Id.*

CONCURRENCE AND DISSENT: The opinion concluded the fraudulent identity card was not the IJ's central consideration in the credibility determination or denial of the alien's applications. *Id.* at 1087. The opinion also would have found the alleged inconsistencies in the alien's testimony to be minor. *Id.* at 1088. The opinion noted that an alien's lack of an explanation for the submission of a fraudulent document could be fatal to an alien's ability to meet his burden of proof. *Id.* at 1089. The opinion would have declined to publish the decision, and the opinion also would have remanded for the IJ to further address the evidence and further analyze the identity issue to the extent it affected the deportability finding and the designation of the country of removal. *Id.* at 1087.

DISSENT: The dissent would have concluded the alien was credible and had established his burden of proof based on the totality of the evidence, which included corroborating documents and detailed testimony regarding his Mauritanian identity, his Fulani membership, and the past harm. *Id.* at 1090–92, 1098–1100. In rejecting the majority's conclusion that the FDL report determination was fatal to the alien's claim, the dissent reasoned that the record contained no information about the FDL report and no indication the identity card contradicted the alien's claimed identity or undermined the rest of the evidence. *Id.* at 1089–90. The dissent also reasoned that the IJ had primarily based her credibility finding on inconsistencies in the testimony rather than the submission of the fraudulent document, and the dissent would not have deferred to the IJ's finding because the inconsistencies were not central to the alien's claim. *Id.* at 1093, 1096. The opinion concluded the IJ's adverse inference drawn from the FDL report determination was speculative in the absence of testimony from the forensics expert and where the alien had not been asked to explain the submission of the fraudulent document. *Id.* at 1094–95. The opinion also noted the IJ designated Mauritania as the country of removal. *Id.* at 1099. The dissent expressed it was "unsettled" by INS's lack of action in confirming his nationality or amending the Order to Show Cause after it had submitted evidence of fraud. *Id.* at 1099.

CONCURRENCE: The opinion would have given deference to the IJ's adverse credibility finding because it was sufficiently supported by the "unrefuted determination" that the identity card was counterfeit and by inconsistencies between the alien's testimony and his first asylum application. *Id.* at 1087. The concurring opinion also would have summarily dismissed the appeal because the alien indicated he would submit a brief and failed to do so. *Id.* at 1086–87.

The Board determined the alien's admission concerning her alienage was elicited after she was improperly denied her Fifth Amendment privilege against self-incrimination. *Id.* The Board therefore disregarded the alien's admission before the IJ and turned its attention to whether the exclusionary rule should apply in deportation proceedings. *Id.* at 73. The Board noted the matter was one of first impression. *Id.* at 73–75. The Board explained that the First Circuit's decision in *Wong Chung Che v. INS*, 565 F.2d 166 (1st Cir. 1977) (holding the product of an unlawful search was inadmissible in deportation proceedings), was based largely on assumed inadmissibility rather than detailed analysis. *Id.* at 75. The Board further reasoned that Courts of Appeals have held that the absence of Miranda warnings does not render otherwise voluntary statements inadmissible in deportation cases. *Id.* at 77. The Board then examined the purposes of the exclusionary rule, the rule's efficacy to serve its objectives in the deportation context, the societal costs incurred by excluding reliable evidence, and the availability of alternatives to deter unlawful conduct by immigration officers. *Id.* at 77–82. The Board ultimately concluded that

neither legal nor policy reasons justified the exclusion of unlawfully seized evidence from deportation proceedings. *Id.* at 83. The Board therefore dismissed the alien's appeal. *Id.* at 71.

CONCURRENCE: In concluding the exclusionary rule was not applicable to deportation proceedings, the concurrence noted that deportation hearings were never linked to formal rules of evidence. *Id.* at 85. The opinion noted that illegally obtained evidence "may be all that will ever be able to identify" the alien. *Id.* The opinion disavowed the majority's reliance on the hypothetical effects of the exclusionary rule on the conduct of law enforcement officers. *Id.* at 85.

DISSENT AND CONCURRENCE: The opinion concurred in the result but disagreed with the majority's rationale. *Id.* at 86. First, the opinion concluded the alienage and deportability were established without reaching the exclusionary rule. *Id.* at 86–88. Second, the opinion concluded that even if the arrest required examination, reopening would be necessary to determine whether an unlawful arrest took place. *Id.* at 88–92. Finally, the opinion concluded that if the applicability of the exclusionary rule was an issue that the Board must address, the rule was applicable in deportation proceedings. *Id.* at 93–98. The opinion summarized that the longstanding practice of the Board had been to recognize the exclusionary rule, there was judicial support for applying the exclusionary rule in civil proceedings, and no sufficient reason to change had been set forth. *Id.* at 98.

Matter of Yee, 11 I&N Dec. 27 (BIA 1964).

Focus issues: Identity, in general.

The alien, born in China, was admitted the United States in 1952 as a U.S. citizen under the name Yee Yok Lin. *Id.* at 27. In his application for a citizenship certificate, he claimed he was single. *Id.* at 28. He later filed a visa petition for his wife, whom he allegedly married in 1957. *Id.* at 28. In the 1958 visa interview, the alien testified as to how he met and married his wife in 1957. *Id.* at 28. His wife's visa petition was approved. *Id.* at 28.

In 1962, the alien filed a visa petition on behalf of his alleged son, born in China in 1951, and his alleged daughter, born in China in 1949. *Id.* at 27. The conditionally approved petitions were forwarded to the U.S. consulate in Hong Kong. *Id.* at 27. During a visa interview in 1962, the alien stated he was married in 1945 by Chinese custom and remarried in 1957 according to western custom. *Id.* at 28. The wife was admitted into the United States in 1960. *Id.* at 28–29. At the wife's visa interview in 1962, the wife explained she did not inform the U.S. consulate about her two children because she claimed her marriage occurred in 1957. *Id.* at 29.

A 1963 report from a consular investigator in Hong Kong questioned the alien's identity due to inconsistencies with the village index, school records of the children, and interviews with villagers and the wife's alleged grandmother. *Id.* The consular report noted two witnesses were shown the alien's photograph and identified him as Louie King Fai. *Id.* at 30. When confronted with this information, the alien denied he his surname was Louie. *Id.* The INS District Director revoked the approved visa petitions because the alien failed to establish the claimed relationship and resolve the discrepancies discovered by the U.S. consulate. *Id.* at 27. In the alien's appeal to the Board, the alien argued he was entitled to recognition as a U.S. citizen and no steps had been

taken to cancel his citizenship certificate. *Id.* at 30. In dismissing the appeal, the Board reasoned that based on the evidence, the alien failed to establish eligibility for the benefits sought. *Id.* at 31.

NOTE: This visa petition case was included in the compilation of case summaries because it contains a helpful discussion of evidence related to establishing identity and familial relationships.

Matter of J- and Y-, 3 I&N Dec. 657 (BIA 1949).

Focus issue: Identity and corroboration.

The appellants, natives and citizens of China, sought admission to the United States as lawful permanent residents under the War Brides Act as the minor alien sons of honorably discharged veterans of World War II. *Id.* at 657. The alleged fathers both indicated they were single with no children at the time of their initial entry to the United States. *Id.* at 658. After the alleged fathers naturalized, the alleged fathers each claimed that they had each had extra-marital relations with women in China prior to initially entering the United States. *Id.* The alleged fathers also claimed that these intimate relations resulted in the birth of the respective appellants. *Id.* A county circuit court in Tennessee issued legitimization decrees for both appellants. *Id.* The Board of Special Inquiry excluded the appellants from entry and the Assistant Commissioner affirmed. *Id.* at 657.

In sustaining the appeal, the Board reasoned the alleged fathers had no legal obligation to disclose the existence of their sons prior to the legitimization proceedings because the alleged fathers were not asked about extra-marital children before that time. *Id.* at 660–61. The Board also explained the claimed identity of the appellants was supported by the appellants' detailed testimony, which was consistent with records of the alleged fathers' testimony. *Id.* at 660. The Board further determined the appellants' claimed identity was supported by the testimony of the alleged parents, alleged uncles, an alleged aunt, and an alleged grandfather, all of whom apparently identified the appellants in photographs. *Id.* Two unrelated witnesses provided additional supporting testimony. *Id.* The Board thus concluded the appellants established their identity as sons of the alleged fathers and, on account of the naturalization of the fathers, the appellants were entitled to admission. *Id.* at 661.

Who are You? – Identity Issues in Immigration: Unpublished Circuit Court Case Summaries

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First Circuit

Villar v. Lynch, ---F. App'x---, 2016 WL 4608130 (1st Cir. Sept. 6, 2016).

Focus issue: Identity and discretion.

The alien used a fraudulent birth certificate for numerous years, and USCIS denied his application for adjustment of status. *Id.* at *1. In denying the alien's adjustment application in removal proceedings, the IJ determined the alien's extended use of the false identity outweighed the favorable discretionary factors, including his marriage to a U.S. citizen, three U.S. citizen children, and payment of taxes. *Id.* The Board affirmed the discretionary denial. *Id.* In dismissing the petition for review, the First Circuit rejected the alien's assertion that the agency created and applied a new legal standard, and the court ruled it did not have jurisdiction to review the discretionary judgment. *Id.* at *2.

Second Circuit

Coulibaly v. Lynch, ---F. App'x---, 2016 WL 3941047 (2d Cir. July 20, 2016).

Focus issues: Identity and credibility, corroboration.

The alien claimed to be a native and citizen of the Ivory Coast who was tortured on account of his ethnicity and political opinion. In denying relief, the IJ made an adverse credibility determination based on several inconsistencies, including the alien's testimony regarding when and how he obtained his Ivory Coast identification card, which conflicted with the date on the card, and his testimony regarding his date of birth and how he obtained his birth certificate, which conflicted with the birth certificate. *Id.* at *1. The IJ also relied on the alien's failure to rehabilitate his testimony with corroborating evidence. *Id.* at 2. The Board affirmed. *Id.* at *1. In denying the petition for review, the Second Circuit upheld the adverse credibility determination on account of the inconsistencies and lack of corroboration. *Id.* at *2. The court specifically noted that the alien was not credible as to whether he was Ivorian. *Id.*

Dhargyal v. Lynch, 632 F. App'x 39 (2d Cir. 2016).

Focus issues: Identity and credibility, corroboration, country of removal.

The alien, a native and citizen of an unknown country, alleged he was of Tibetan ethnicity. The IJ found that the alien credibly established his Tibetan ethnicity, denied his applications for asylum, withholding of removal, and CAT, and ordered him removed to China. The Board upheld the denial of relief based solely on the insufficiency of identity-related documentary evidence. *Id.* at 40. The Second Circuit noted that although nationality was a threshold question in asylum eligibility, an applicant could demonstrate asylum eligibility through credible testimony alone. *Id.* The court remanded for consideration of the alien's testimony and the IJ's

credibility determination. *Id.* at 40–41. The court further noted that, unlike asylum, withholding of removal and CAT were available as to the “proposed country of removal”; thus, whether or not the alien established Chinese citizenship, the Board must consider his eligibility for withholding of removal and CAT with regard to China if the Board affirmed on remand the IJ’s finding regarding the alien’s Tibetan ethnicity. *Id.* at 41.

Dicko v. Lynch, 618 F. App’x 701 (2d Cir. 2015).

Focus issue: Identity and country of removal.

The alien claimed to be a Mauritanian citizen who was persecuted and feared future persecution in Mauritania. *Id.* at 703. His admission record listed Mali as his country of nationality and the DHS recommended Mali as the country of removal. *Id.* The IJ concluded the alien did not establish his identity or Mauritanian citizenship, ordered him removed to Mali, and denied his application for withholding of removal. *Id.* at 703. The Board affirmed. *Id.* at 701. In denying the petition for review, the Second Circuit reasoned that the alien did not claim his life or freedom would be threatened in Mali and thus did not demonstrate his removal to Mali should be withheld. *Id.* at 703.

Dolma v. Holder, 582 F. App’x 65 (2d Cir. 2014).

Focus issue: Identity and country of removal.

The IJ denied an ethnic Tibetan’s application for deferral of removal, and the Board affirmed based the determination the alien failed to establish her Chinese citizenship. *Id.* at 66. In remanding the case, the Second Circuit concluded the agency erred in treating the alien’s nationality as a threshold issue in determining CAT eligibility because it was only a threshold issue in asylum cases. *Id.* at 65–66. The court also instructed the agency to make an explicit determination regarding the alien’s country of nationality and citizenship so the agency could then determine (1) the country of removal and (2) which country would be relevant to CAT analysis. *Id.*

Sangmo v. Holder, 566 F. App’x 23 (2d Cir. 2014).

Focus issues: Identity, in general, and country of removal.

The alien presented evidence regarding her Tibetan ethnicity and Chinese citizenship: a photocopy of her Chinese household registration booklet, letters from family members, a letter from the Tibetan Refugee Transit Center in Nepal, a letter from the Regional Tibetan Youth Congress of New York and New Jersey, a letter from the Office of Tibet in New York, a letter from the Tibetan Youth Club in Nepal, and a witness who was a Tibetan national. *Id.* at 25. The IJ afforded minimal weight to this evidence because the documents largely did not mention the basis upon which the authors confirmed her Tibetan ethnicity and the alien did not make efforts to establish the reliability and authenticity of the documents. *Id.* The IJ also noted several documents were issued by organizations in Nepal or the United States. *Id.* The IJ also did not

credit the alien’s explanation that she threw away her Chinese identity card when she left China because she thought she would face difficulty if she brought the card to Nepal. *Id.* The IJ denied her applications for asylum, withholding of removal, and CAT based on her failure to establish her identity. *Id.* at 24–26. The IJ also found the evidence indicated she was an Indian citizen and ordered her removed to India. *Id.* at 26. The Board affirmed. *Id.* at 24.

In denying the petition for review, the Second Circuit determined the agency’s finding that the alien failed to establish her identity was supported by substantial evidence. *Id.* at 25–26. The court also concluded the alien did not allege she would be harmed in India and did not contest the IJ’s designated country of removal. *Id.* at 26.

Ba v. Holder, 490 F. App’x 368 (2d Cir. 2012).

Focus issue: Identity and credibility.

The alien, a native and citizen of Mauritania, claimed to be a Mauritanian slave. *Id.* at 368–69. He submitted Red Cross documents indicating he resided in a Senegalese camp during years that other evidence and his testimony indicated he was in the United States. *Id.* at 369. He also submitted an unauthenticated Mauritanian birth certificate that contradicted the birth date to which he testified. *Id.* The alien offered an explanation for the discrepancy between the Red Cross letter and his testimony but did not address the other inconsistencies. *Id.* The IJ made an adverse credibility determination based partially on inconsistencies between the alien’s identity documents and testimony, and the IJ denied his applications for asylum, withholding of removal, and CAT. *Id.* The Board affirmed. *Id.* at 368. The Second Circuit noted that an asylum applicant has the burden to establish his nationality and that failure to do so may undermine the asylum claim. *Id.* at 369. The court then upheld the adverse credibility determination and denied the petition for review. *Id.*

Depa v. Holder, 486 F. App’x 933 (2d Cir. 2012).

Focus issue: Identity and country of removal.

The alien, an ethnic Tibetan, sought asylum, withholding of removal, and CAT. *Id.* at 934. Based on the alien’s statement on the record that she was a native and citizen of Tibet, the IJ concluded she was a native and citizen of China. *Id.* at 934. The Board affirmed. *Id.* In denying the petition for review, the Second Circuit reasoned that the United States recognized Tibet to be part of China. *Id.* The court declined to address the alien’s challenge to the credibility determination regarding harm she suffered in Nepal, as she was ordered removed to China, not Nepal. *Id.* at 934 n.1.

Alam-Begum v. Holder, 486 F. App'x 929 (2d Cir. 2012).

Focus issues: Identity and credibility, corroboration.

The alien claimed he obtained his passport from the Bangladeshi consulate in New York based on his friend's statement alone, without providing documentary proof of his identity or filing any paperwork. *Id.* at 930. The IJ based the adverse credibility determination largely on the implausible nature of this claim and denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* at 929–30. The Board affirmed. *Id.* at 930. In upholding the adverse credibility finding and denying the petition for review, the Ninth Circuit noted that the alien's passport was open-ended despite his alleged criminal charges pending in Bangladesh. *Id.*

Phuntsok v. Holder, 475 F. App'x 343 (2d Cir. 2012).

Focus issues: Identity and credibility, corroboration.

The alien asserted he was native of Tibet and citizen of China. *Id.* at 344. He proffered his Green Book, letters from New York offices of Tibetan organizations, an uncertified copy of his Chinese household registry booklet, and letters from his wife and friend asserting the Nepalese passport he used to obtain his U.S. visa was fraudulent. *Id.* The IJ afforded minimal weight to these documents and placed greater weight on his I-94 arrival/departure record and his U.S. visa, which listed his citizenship as Nepalese. *Id.* The IJ made an adverse credibility determination and further found the alien did not meet his burden to establish his nationality. *Id.* at 344. He denied his applications for asylum, withholding of removal, and CAT and ordered him removed to Nepal. *Id.* at 344–45. The Board affirmed the IJ's decision except for the adverse credibility determination. *Id.* at 344.

In denying the petition for review, the Second Circuit concluded the IJ's weighing of the evidence was reasonable and he reasonably found that the alien failed to obtain numerous documents that were available to him. *Id.* at 344–45. The Second Circuit noted that most of the alien's proffered documents did not explain the basis for the authors' conclusions regarding his ethnicity, and the court also noted the letters from organizations were issued by satellite offices in the United States based on his Green Book, which post-dated his arrival in the United States. *Id.* at 344. The court explained the IJ reasonably gave minimal weight to his wife and sister's letters because they were unsworn. *Id.* Additionally, the court determined the alien did not establish eligibility for withholding of removal and CAT, in that he did not allege he was harmed or would be harmed in Nepal. *Id.* at 345.

Tsomo v. Holder, 462 F. App'x 137 (2d Cir. 2012).

Focus issue: Identity and country of removal.

The alien was born in Nepal to Tibetan refugees. *Id.* at 138. Without making a finding regarding her nationality, the IJ pretermitted her asylum application on account of the one-year filing deadline, denied her applications for withholding of removal and CAT, and ordered her

removed to Nepal. *Id.* at 138–39. The Board affirmed. *Id.* at 138. The alien did not challenge the CAT denial but asserted the agency erred in not reaching the threshold question of her nationality before denying her asylum application. *Id.* at 138.

In partially dismissing and partially denying the petition for review, the Second Circuit concluded the agency did not need to address the nationality issue in this instance. *Id.* The court reasoned that reaching the nationality issue was not required because the agency pretermitted the asylum application as untimely and the court did not have jurisdiction to review a challenge to that finding. *Id.* at 138–39. The court also concluded a nationality finding was not needed to review the alien’s eligibility for withholding of removal, as she asserted she faced persecution in Nepal and the agency’s determination that she failed to establish past persecution or fear of future persecution in Nepal was supported by substantial evidence. *Id.* at 139.

Dia v. Holder, 459 F. App’x 50 (2d Cir. 2012).

Focus issue: Identity and credibility.

The alien alleged he was a native and citizen of Guinea. *Id.* at 51. The Board denied the untimely motion to reopen removal proceedings based on a determination that the alien failed to establish either his identity or nationality and therefore could not establish the changed country conditions relevant to his motion. *Id.* In denying the petition for review, the Second Circuit reasoned that the Board did not abuse its discretion in not crediting the evidence submitted with the alien’s motion, as he was found not credible in the underlying proceedings and had applied for asylum under a false name, provided untrue testimony, and submitted false documents. *Id.* at 51–52.

Samdup v. Holder, 457 F. App’x 44 (2d Cir. 2012).

Focus issue: Identity and credibility.

The alien asserted he was an ethnic Tibetan and a native and citizen of China. *Id.* at 45. A forensic examiner offered expert testimony indicating the alien’s Chinese birth certificate was fraudulent, and the IJ rejected the alien’s explanation for how he acquired the document. *Id.* The alien also admitted that he obtained his U.S. visa through fraud. *Id.* at 46. The IJ made an adverse credibility determination based on the fraudulent documents, and she further concluded the alien did not obtain his visa by fraud to escape persecution. *Id.* at 45–46. The Board affirmed the IJ’s decision. *Id.* The Second Circuit upheld the adverse credibility determination, explained the alien bore the burden of establishing his identity because his application was based on his claim that he was a citizen and national of China, and denied the petition for review. *Id.*

Ba v. Holder, 402 F. App'x 611 (2d Cir. 2010).

Focus issues: Identity and credibility, corroboration.

The alien purported to be a native and citizen of Mauritania who suffered past persecution on account of his Fulani ethnicity. *Id.* at 612. He was unable to answer basic questions about Mauritania and the camp at which he was allegedly detained for three years, and he provided vague responses when the IJ attempted to solicit details. *Id.* at 612. He submitted a “declaration of birth” that was unauthenticated, unsigned, and only partially translated, and the IJ did not afford it any evidentiary weight. *Id.* at 613. The IJ denied his applications for asylum, withholding of removal, and CAT based on an adverse credibility determination, among other grounds. *Id.* The Board upheld the IJ’s credibility finding and dismissed the appeal. *Id.* The Second Circuit concluded that the IJ did not err in requiring corroborating evidence because the alien provided vague testimony, and the court determined the alien’s failure to submit such evidence further undermined his credibility. *Id.* at 613. The court concluded his applications were all based on the same factual predicate and denied the petition for review. *Id.*

Mudiangomba v. Holder, 401 F. App'x 600 (2d Cir. 2010).

Focus issue: Identity, in general.

The IJ found the alien failed to establish his Congolese identity and thus could not establish *prima facie* eligibility for relief. *Id.* at 600; *see also Mudiangomba v. Holder*, 372 F. App'x 161 (2d Cir. 2010). The Board declined to consider the alien’s newly submitted identity documents because they were not previously unavailable, and the Board denied his motion to reopen removal proceedings. *Id.* at 601. In denying the petition for review, the Second Circuit concluded the Board did not abuse its discretion in denying the motion because the alien did not successfully rebut the IJ’s dispositive identity determination. *Id.*

Mudiangomba v. Holder, 372 F. App'x 161 (2d Cir. 2010).

Focus issues: Identity and credibility, country of removal.

The alien purported to be a native and citizen of the Democratic Republic of Congo (“DRC”). *Id.* at 162. The record contained a Zambian passport bearing the alien’s photograph with a different name, and a Forensic Document Laboratory report that concluded the passport conformed to genuine documents in the laboratory’s collection and did not contain conclusive evidence of alterations. *Id.* at 163. A report from the DOS indicated that the alien appeared in person as an applicant at the U.S. consulate in Zambia, represented that he was born in Zambia, and received a U.S. visa. *Id.* The IJ rejected the alien’s explanation that smugglers provided him with the passport. *Id.* The IJ then made an adverse credibility finding and determined he failed to establish he was a native and citizen of the DRC. *Id.* The IJ denied his applications for asylum, withholding, and CAT. *Id.* The Board affirmed. The alien filed a motion to reconsider with the Board in which he asserted the IJ’s order that designated the DRC as the alternative country of removal was inconsistent with the agency’s finding that he failed to establish his

nationality and citizenship. *Id.* at 164. The Board denied the motion and the alien petitioned for review of both Board orders. *Id.* at 162.

In denying the petitions for review, the Second Circuit found a reasonable factfinder would not be compelled to conclude the alien established he was a native and citizen of the DRC, and the court deferred to the IJ's adverse credibility determination. *Id.* at 163. The court also concluded the alien's testimony that he resided in the DRC supported the IJ's designation of the DRC as a country of removal. *Id.* at 164.

Dhanday v. Holder, 370 F. App'x 178 (2d Cir. 2010).

Focus issue: Identity and corroboration.

The alien submitted two letters corroborating his claim that he was an Indian national. *Id.* at 179. The IJ found that this evidence was insufficient for the alien to meet his burden of establishing his nationality, and the IJ provided him with time to provide more official documents. *Id.* The alien did not provide additional corroborating evidence by the deadline, so the IJ determined he failed to establish eligibility for asylum, withholding of removal, and CAT. *Id.* The Board summarily affirmed. The Second Circuit concluded the agency's determination was supported by substantial evidence and denied the petition for review. *Id.*

Samake v. Holder, 369 F. App'x 160 (2d Cir. 2010).

Focus issues: Identity and credibility, corroboration.

The alien claimed to be a native and citizen of Cote D'Ivoire. He submitted a passport and identification document that were issued when he was not living in Cote d'Ivoire, and he admitted that the fingerprint on the identity card was not his own. *Id.* at 161. The IJ made an adverse credibility determination and denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* at 160–61. The Board declined to reach the credibility issue and upheld the denial of relief based on insufficient evidence. *Id.* at 161. The Second Circuit stated an applicant's failure to establish his identity was alone sufficient to deny relief. *Id.* The court then noted the questionable circumstances surrounding the creation of the documents and denied the petition for review. *Id.*

Jalloh v. Holder, 350 F. App'x 531 (2d Cir. 2009).

Focus issue: Identity and credibility.

The alien purported to be a native and citizen of Sierra Leone. *Id.* at 532. The IJ denied his applications for asylum, withholding of removal, and CAT. *Id.* In concluding the alien was not credible regarding his identity, the IJ considered a forensic expert's report and testimony indicating the alien's birth certificate was counterfeit and his identity card was altered. *Id.* at 533. The IJ also noted the alien failed to provide an explanation for how he allegedly received the birth certificate from his mother in 1996 although the Sierra Leonean government did not

use that format for birth certificates until 2 years later. *Id.* The IJ further noted the birth certificate bore the issuance date of 2000, which was after the date to which the alien testified that he saw his mother for the last time. *Id.* The alien also failed to explain why two contradictory birth certificates were submitted. *Id.* at 532–33. The Board summarily affirmed the IJ’s decision. *Id.* at 532. In denying the petition for review, the Second Circuit upheld the adverse credibility finding and concluded this determination precluded his claims for withholding of removal and CAT, as they were based on the same factual predicate.

Gahutu v. Holder, 349 F. App’x 571 (2d Cir. 2009).

Focus issue: Identity and credibility.

The IJ found the alien, a native and citizen of Burundi, was not credible in part because of his unfamiliarity with the identity documents he submitted, his inconsistent testimony regarding how long he was in possession of them, and his implausible testimony as to how he concealed the documents during his imprisonment. *Id.* at 572–73. The IJ denied his applications for asylum, withholding of removal, and CAT. *Id.* at 572. The Board affirmed. *Id.* In denying the petition for review, the Second Circuit reasoned the IJ properly considered the cumulative impact of the inconsistencies. *Id.* at 573. The court explained the inconsistencies went to the heart of the alien’s claim because they cast doubt on his identity, and the court further concluded the IJ properly determined he failed to rehabilitate his testimony with corroborating evidence. *Id.*

Gako v. Holder, 313 F. App’x 441 (2d Cir. 2009).

Focus issues: Identity and credibility, corroboration.

The alien claimed to be a native and citizen of Mauritania and submitted his birth certificate, acquired after his arrival in the United States, rather than his national identity card. *Id.* at 443. The IJ made an adverse credibility finding based on the alien’s inconsistent and confusing testimony regarding his identity documents and the lack of corroborating documents. *Id.* at 442. The IJ denied the alien’s applications for asylum, withholding of removal, and CAT, and the Board affirmed. *Id.*

In denying the petition for review, the Second Circuit noted “proof of identity is paramount in asylum proceedings.” *Id.* at 443. The court explained that because the alien’s inconsistent testimony as to his identity documents cast doubt on his identity, his inability to corroborate his claim supported the adverse credibility determination. *Id.*

Mamic v. Mukasey, 302 F. App’x 3 (2d Cir. 2008).

Focus issue: Identity and country of removal.

The alien claimed to be stateless and applied for asylum, withholding of removal, and CAT. *Id.* at 4. The IJ found that he was native and citizen of Croatia, denied his applications, and ordered

him deported to Croatia. *Id.* The Board affirmed. *Id.* In denying the petition for review, the Second Circuit concluded the alien did not properly challenge the IJ's finding that he was a native and citizen of Croatia in his appeal to the Board and therefore abandoned the argument. *Id.* The court also noted the record contained evidence that he was born in Croatia, attended university there, served ten months in the Croatian army, and lived in Croatia before entering the United States. *Id.* at 4 n.2.

Gyamtso v. Att'y Gen. of U.S., 296 F. App'x 235 (2d Cir. 2008).

Focus issues: Identity and credibility, corroboration.

The alien entered the United States using an Indian passport and U.S. tourist visa with the name Ngawang Bhutia. *Id.* at 236–37. He later affirmatively filed an application for asylum and claimed the Indian passport and visa were fraudulently obtained. *Id.* at 237–39. In the application, he asserted he was Tashi Gyamtso, a native of Tibet and citizen of China. *Id.* at 237. In removal proceedings, he submitted a Green Book issued by the Office of Tibet in New York, a letter from the same office, a photo of himself with his wife in Tibet, and a verified Chinese household register indicating he was born in Tibet, a photo of his wife and children in India, photos of himself in political demonstrations in India, and other letters and affidavits. *Id.* at 238. The DHS submitted a Forensic Documents Laboratory (“FDL”) report that concluded the Indian passport was authentic and stated the Green Book and household register could not be authenticated. *Id.* at 238–39. The IJ found the evidence indicated the alien was a native of India and, at best, the other documents created a question regarding his identity, nationality, and citizenship, which the alien failed to resolve. *Id.* The IJ made an adverse credibility finding, denied his applications for asylum, withholding of removal, and CAT, and ordered him removed to India. *Id.* The Board adopted and affirmed the IJ's decision. *Id.*

The Second Circuit upheld the adverse credibility finding, noting, *inter alia*, that the agency reasonably concluded the alien's testimony regarding his children's gender contradicted the household register and this discrepancy went to the heart of his identity claim. *Id.* at 237–38. The court determined the applications were all based on the same factual predicate and therefore the court denied the petition for review. *Id.* at 239.

Bathily v. Mukasey, 284 F. App'x 861 (2d Cir. 2008).

Focus issue: Identity and corroboration.

The alien claimed to be an ethnic Fulani and native of Mauritania. He submitted a document issued by the Ministry of the Interior Division of Foreign Police stating he was “matriculated” as a Mauritanian refugee and a letter from the mayor of Guediawaye, Senegal, indicating he lived in the Mauritanian Refugee Camp of Thilogne. *Id.* at 862. The IJ found the alien did not meet his burden of establishing his identity and the Board summarily affirmed. *Id.* The Second Circuit remanded the case, concluding the agency did not properly consider these material documents, which bore directly on his alleged identity as a Mauritanian refugee. *Id.*

Sangpo v. Mukasey, 264 F. App'x 95 (2d Cir. 2008).

Focus issues: Identity, in general, and country of removal.

The alien asserted that he was a native and citizen of Tibet. *Id.* at 96. He submitted a household register indicating he resided in Tibet, and the IJ afforded the document no evidentiary weight because it was submitted on the day of the hearing despite being translated three months earlier. *Id.* at 97. The IJ also noted the household register was not issued at the time of his birth and did not specify his nationality or citizenship. *Id.* A forensic report indicated the alien's purportedly fraudulent Nepalese passport conformed to genuine passports, and the IJ concluded the alien was a citizen of Nepal based on this report. *Id.* at 97–98. The IJ further found the alien's witness, who testified regarding the alien's nationality, failed to provide convincing evidence. *Id.* at 98. The IJ denied his applications for asylum, withholding of removal, and CAT, and ordered him removed to a country designated by the Attorney General. *Id.* at 99. The Board agreed with the IJ's findings regarding the alien's identity. *Id.* at 96.

The Second Circuit concluded the reasons above sufficiently supported the agency's determination that the alien failed to establish his identity. *Id.* at 98. The court further determined the identity finding was dispositive of the alien's asylum claim and, because the withholding of removal and CAT claims were based on the same factual predicate, the court denied his applications. *Id.* at 98. The court remanded for the limited purpose of allowing the Board to determine whether the IJ's removal order that did not designate a specific country complied with the regulatory requirements governing the designation of a country of removal. *Id.* at 99.

Kamana v. Holder, 250 F. App'x 444 (2d Cir. 2007).

Focus issue: Identity and credibility.

The alien, purportedly a native and citizen of Burundi, claimed he could only speak French and not the native language of Burundi. *Id.* at 445–46. The IJ did not credit his explanation and found it inconsistent with his testimony, with indications from the court interpreter that his French was difficult to understand, and with evidence that his asylum interview was conducted in Swahili. *Id.* at 446. The IJ also noted the alien did not know the main religion of Burundi and that the authenticity of his Burundian identity card could not be confirmed by the forensics examiner. *Id.* The IJ concluded he was not credible and failed to establish his identity and country of origin. *Id.* at 446. The IJ denied his applications for asylum, withholding of removal, and CAT, and the Board affirmed. *Id.*

In denying the petition for review, the Second Circuit concluded the agency's adverse credibility determination was reasonable and fatal to the alien's applications, as the inconsistencies went to "the most basic aspect of his claim," namely, his Burundian nationality and his assertion that he feared persecution by the ruling ethnic group. *Id.* at 446. The court reasoned the IJ properly afforded the unverified identity card minimal weight in light of the other inconsistencies. *Id.*

Yi Mei Wang v. Mukasey, 259 F. App'x 384 (2d Cir. 2008).

Focus issue: Identity and credibility.

The alien was a native and citizen of China. *Id.* at 385. The IJ made an adverse credibility determination and denied her applications for asylum, withholding of removal, and CAT. *Id.* In finding the alien not credible, the IJ pointed to inconsistent statements related to how she received the notarial birth certificate, which contradicted the certificate itself. *Id.* The IJ did not credit the alien's explanation that she did not know where it came from. *Id.* at 385–86. The Board affirmed. *Id.* at 385. In denying the petition for review, the Second Circuit concluded that the agency's adverse credibility determination was proper, as the inconsistencies related to the birth certificate called its authenticity into question and therefore the threshold question of her identity was also in doubt. *Id.* at 386. The court found the lack of credibility also precluded her from withholding of removal and CAT because these claims had the same factual premise. *Id.*

Dia v. Keisler, 248 F. App'x 251 (2d Cir. 2007).

Focus issues: Identity and credibility, corroboration.

The alien claimed to be a native and citizen of Mauritania. He submitted a birth extract purportedly issued by the Mauritanian government in 1992 and a card purportedly issued by Thilogne Refugee Camp in Senegal. *Id.* at 253. The IJ found that the birth extract was inconsistent with the alien's testimony that his father left Mauritania in 1990 and never returned, and the IJ did not credit the alien's explanation that he did not know how his uncle obtained the document. *Id.* The IJ also afforded minimal weight to the refugee identity card because the alien was unable to identify the correct color of the card and the IJ therefore found his lack of familiarity with the card suspect. *Id.* at 253. The IJ concluded the alien was not credible, observed that the alien did not establish his identity or nationality, and denied his applications for asylum, withholding of removal, and CAT. *Id.* at 253–54. The Board adopted and affirmed the IJ's decision. *Id.* at 252.

The Second Circuit denied the petition for review. *Id.* at 254. The court determined that substantial evidence supported the IJ's conclusions regarding credibility and the alien's failure to establish his identity through documentary evidence. *Id.* at 253–54. The court concluded the alien was unable to meet his burden of proof to establish eligibility for relief because the IJ reasonably expected the alien to submit other documents to corroborate his identity and he failed to do so. *Id.* at 254.

Gyltzen v. Keisler, 248 F. App'x 249 (2d Cir. 2007).

Focus issues: Identity, in general, and country of removal.

The alien claimed to be a native Tibetan who feared deportation to Tibet if he was removed to Nepal. *Id.* at 250. He asserted there was a clear probability that he would be persecuted and

tortured in Tibet. *Id.* at 251. He submitted a Nepalese passport issued with the name “Thinley Lama” that he used to obtain his K-1 visa and enter the United States. *Id.* at 250–51. The alien claimed he only adopted a Nepalese identity to obtain the passport, but the same name appeared on his son’s birth certificate, which was issued a year before the passport. *Id.* at 251. The IJ denied his applications for asylum, withholding of removal, and CAT, and ordered the alien removed to Nepal. *Id.* at 251. The Board affirmed and supplemented the IJ’s decision. *Id.* at 250. The Board denied asylum because the alien did not produce credible evidence of a Tibetan identity and therefore did not establish a basis for past persecution on account of his nationality. The Board also denied his applications for withholding of removal and CAT. *Id.* at 250–51.

The Second Circuit denied the petition for review. The court reasoned that the alien’s claims of future persecution or torture must be analyzed with respect to Nepal because he did not establish his Tibetan nationality, and it concluded the country conditions materials did not provide a reason to believe the alien would be deported to Tibet if he was removed to Nepal. *Id.*

Simeonov v. Board of Immigration Appeals, 235 F. App’x 760 (2d Cir. 2007).

Focus issue: Identity and country of removal.

The IJ denied the alien’s applications for asylum, withholding of removal, and CAT and ordered him removed to Bulgaria. *Id.* at 761. The Board affirmed. *Id.* The alien asserted before the Second Circuit that the IJ did not sufficiently determine his nationality, and he challenged the country of removal designation. *Id.* at 763. Even if the IJ had provided insufficient findings as to whether Bulgaria was the alien’s country of nationality or country of last habitual residence, the court determined that remand would be futile, as the alien did not allege that he would suffer persecution anywhere other than Bulgaria. *Id.* at 762. The court also explained the governing statutory provision, case law, and regulation allowed Bulgaria to be designated even if the country did not consent in advance to accept him and even if the United States government was unable to remove him there. *Id.* at 763. Thus, the court denied the petition for review. *Id.*

Choezom v. Immigration and Customs Enforcement, 210 F. App’x 116 (2d Cir. 2006).

Focus issue: Identity and country of removal.

The alien, a native of Nepal, denied Nepalese citizenship and claimed to be a Tibetan national. *Id.* at 117. The IJ and the Board did not address the nationality issue. *Id.* at 118. In remanding the case, the Second Circuit noted it was error to deny applications for asylum and withholding of removal before addressing the threshold issue of the alien’s nationality. *Id.* at 117–18.

Jin He Lin v. Gonzales, 197 F. App'x 67 (2d Cir. 2006).

Focus issue: Identity and credibility.

The IJ made an adverse credibility determination based partially on the alien's submission of two Chinese notarial birth certificates and his inconsistent statement that he submitted only one. *Id.* at 69. The IJ denied the alien's applications for asylum and withholding of deportation, and the Board affirmed. *Id.* at 68. The Second Circuit stated that asylum applicants carry the burden to establish identity, and the court concluded the discrepancy undermined his credibility and went to the heart of his claim. *Id.* at 69. Thus, the court denied the petition for review. *Id.*

Tenzin Nima Tsering v. INS, 165 F. App'x 907 (2d Cir. 2006).

Focus issue: Identity and credibility.

The alien claimed to be a Tibetan citizen, but the IJ found it more likely that he was a native and citizen of Nepal who was firmly resettled in Nepal or India. *Id.* at 908. The IJ denied his applications for asylum and withholding of removal, and the Board summarily affirmed. *Id.* In denying the petition for review, the Second Circuit determined the evidence did not support a finding that he was firmly resettled in India, but the court further reasoned his asylum eligibility turned on his identity and nationality because that would direct the inquiry to his feared persecution in either China or Nepal. *Id.* at 908. The court concluded he failed to meet his burden of establishing the fundamental fact of his citizenship or nationality, as he provided confusing testimony that contradicted his documentary evidence. *Id.* at 909. The court further found the contradictions undermined his overall credibility. *Id.*

Parajuli v. Bureau of Citizenship and Immigration Services, 159 F. App'x 309 (2d Cir. 2005).

Focus issue: Identity and country of removal.

The alien claimed to be a Tibetan national and submitted evidence that China conferred nationality on Tibetan residents and their descendants who resided outside of China. *Id.* at 310. Without addressing the nationality issue, the IJ and the Board denied the alien's application for asylum and withholding of removal. *Id.* at 310. In remanding the case, the Second Circuit concluded it was error not to address the nationality issue before denying the applications. *Id.*

Indirakumar v. INS, 205 F.3d 1323, 2000 WL 19102 (2d Cir. 2000) (unpublished).

Focus issues: Identity and credibility, corroboration.

The alien attempted to enter the United States on an altered Sri Lankan passport that contained his photograph. *Id.* at 1323. He admitted the passport was not his own and presented a Sri Lankan identity card later found to be counterfeit by a forensic examination. *Id.* He also presented a birth certificate, marriage certificate, and the testimony of his alleged sister. *Id.* The IJ denied his applications for asylum and withholding of removal, and the Board dismissed his

appeal. *Id.* The alien argued the Board improperly based its adverse credibility finding on the counterfeit document and unreasonably required him to corroborate his identity and nationality. *Id.* In denying the petition for review, the Second Circuit explained that where an applicant's credibility was called into question, the Board could require corroborative evidence to establish an applicant's claim. *Id.* The court determined the Board credited the forensic report and properly considered the record as a whole before determining the alien failed to establish eligibility for asylum and withholding of removal. *Id.*

Third Circuit

Dorjee v. Att'y Gen. of U.S., 538 F. App'x 171 (3d Cir. 2013).

Focus issue: Identity and country of removal.

The alien was born in India to Tibetan refugee parents and denied he was a citizen or national of India. *Id.* at 171. The IJ took administrative notice of the Indian Citizenship Act of 1955, which provided persons born in India between 1950 and 1987 were citizens, and the IJ adjourned to give the parties an opportunity to submit evidence regarding his nationality. *Id.* at 171–72. The IJ subsequently found he was a national of India, designated India as the country of removal, denied asylum and withholding of removal as to India, and granted withholding of removal as to China and Nepal. *Id.* The Board upheld the IJ's nationality finding and the IJ's denial of his applications. *Id.*

In his brief to the Second Circuit, the alien cited *Dhoumo v. Board of Immigration Appeals*, 416 F.3d 172, 173 (2d Cir. 2005), in which the Second Circuit stated Tibetan refugees and their children are not considered citizens by the Indian government. *Dorjee*, 538 F. App'x at 172. The Third Circuit noted *Dhoumo* did not involve the status of children who were born in India to Tibetan refugee parents and the decision also did not discuss the Indian Citizenship Act. *Dorjee*, 538 F. App'x at 172. The court rejected the alien's alternate argument that even if he was eligible for Indian citizenship, he never claimed it. *Id.* The court explained that he must show he is unable to return to India due to persecution, not simply because he is unwilling to accept his citizenship. *Id.* In denying the petition for review, the Third Circuit noted the alien did not challenge the determination that he was not entitled to asylum or withholding of removal as to India. *Id.*

Sakho v. Att'y Gen. of U.S., 276 F. App'x 243 (3d Cir. 2008).

Focus issues: Identity and credibility, corroboration.

A purported Mauritanian national was issued a Notice to Appear that stated his nationality and citizenship were unknown. *Id.* at 244. He submitted a Mauritanian birth certificate and national identity card ("first identity card"), and the IJ granted a continuance so he could attempt to have the documents authenticated by the U.S. consulate. *Id.* The IJ reminded the alien it was his burden to establish his identity. *Id.* The DHS sent the documents to the Forensic Document

Laboratory (“FDL”), which issued a report stating the birth certificate was counterfeit. *Id.* at 244–45. The report also stated the authenticity of the first identity card could not be verified but its issuance date had been altered. *Id.* at 245.

The case was transferred to another IJ who granted several continuances for the alien to obtain authentic documents. *Id.* He submitted a Certificate of Nationality and a letter from the Mauritanian embassy stating his identity card and certificate of nationality were genuine. *Id.* The DHS pointed out the letter referenced in the embassy’s letter had a different document number than that on the alien’s first identity card. *Id.* The alien then produced the second identity card, which was referenced in the embassy’s letter, and the DHS sent the second identity card, embassy’s letter, and Certificate of Nationality to the FDL, which could not verify their authenticity. *Id.* The alien explained he did not know his birth certificate, which he obtained to leave the refugee camp in Senegal, was fake, and he had asked his mother to send him “good documents” when the DHS alleged it was fake or altered. *Id.* at 245–46. The alien also produced an identity witness whose testimony contradicted his own testimony. *Id.* at 246. Based on the aforementioned evidentiary issues, the IJ found that the alien did not meet his burden of establishing he was a native and citizen of Mauritania. *Id.* at 246–47. The IJ also drew an adverse credibility inference from the alien’s submission of a fraudulent document and denied his applications for asylum, withholding of removal, and CAT. *Id.* at 247.

In dismissing the appeal, the Board agreed the alien’s submission of an altered identity card and suspect birth certificate undermined the credibility of his entire claim, and the Board also noted other inconsistencies in the record that supported the adverse credibility determination. *Id.* at 247–48. The alien argued that his due process rights were violated because he could not cross-examine the FDL examiner, but the Board concluded there was no evidence he requested the examiner be called as a witness. *Id.* at 247.

In denying the petition for review, the Third Circuit upheld the adverse credibility determination based on the alien’s submission of a fraudulent document. *Id.* at 248. The court explained this case was more similar to *Diallo v. Mukasey*, 508 F.3d 451 (8th Cir. 2007) (holding an applicant must establish identity and nationality regardless of whether the applicant had knowledge of the falsity of a counterfeit document), than *Kourski v. Ashcroft*, 355 F.3d 1038 (7th Cir. 2004) (holding that a falsified document cannot be the sole basis of an adverse credibility determination where the alien had no reason to believe the document was false), because the Board did not base the adverse credibility finding solely on the fraudulent documents. *Sakho*, 276 F. App’x at 248. The court also upheld the Board’s determination that the alien’s due process rights were not violated, as he did not request the examiner be called as a witness and had acknowledged the birth certificate and first identification card were inauthentic. *Id.*

Gelaneh v. Ashcroft, 153 F. App'x 881 (3d Cir. 2005).

Focus issues: Identity and credibility, corroboration.

The IJ concluded that the alien's testimony was not credible and the alien failed to provide corroborating documents establishing his identity despite ample opportunity. *Id.* at 888. The IJ therefore denied his applications for withholding of removal and CAT. *Id.* at 884. The Board affirmed the IJ's result. *Id.* The Third Circuit denied the petition for review, noting the lack of credibility went to the heart of the claim that he would more likely than not be persecuted or tortured in Ethiopia. *Id.* at 885, 887–88.

Dhaliwal v. Ashcroft, 110 F. App'x 230 (3d Cir. 2004).

Focus issues: Identity, in general, and credibility.

The alien, a native of India, claimed that he was born into a Sikh family and experienced multiple acts of persecution on account of his affiliation with the Akali Dal Mann party, a political organization comprised largely of Sikhs. *Id.* at 231. He submitted a passport that he claimed he used to enter the United States. *Id.* The Sikh surname "Singh" did not appear in the passport and, in the passport photograph, the alien had a trimmed beard and was not wearing the traditional Sikh turban. *Id.* at 231–32. The IJ did not credit the alien's explanation that he omitted the surname and changed his appearance to avoid persecution because, according to his testimony, the passport was issued during a time when he had no problems with the authorities. *Id.* at 232. The IJ also found that the letters the alien submitted from acquaintances did not adequately identify him as the person he claimed to be. *Id.* The IJ made an adverse credibility determination partially based on the alien's failure to adequately prove his identity, then denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* at 230–31. The Board summarily affirmed. *Id.* at 231.

In denying the petition for review, the Third Circuit noted the applicant had the burden of proving eligibility for asylum. *Id.* at 233. The court reasoned the alien's identity as a political Sikh was fundamental to his eligibility for relief and upheld the IJ's finding that he did not adequately prove his identity. *Id.* at 233–34.

Fourth Circuit

No cases.

Fifth Circuit

Afatika v. Holder, 312 F. App'x 626 (5th Cir. 2009).

The alien, a native and citizen of Cameroon, entered the United States with a passport and visa in the name of Ernest Atoh Shu and sought asylum under a different name. *Id.* at 626. The DHS submitted numerous documents to support its allegation that he was actually Ernest Atoh Shu, and the alien testified regarding his identity and past experiences in Cameroon. *Id.* The IJ made an adverse credibility finding and concluded he did not meet his burden of establishing his identity or eligibility for asylum, withholding of removal, or CAT. *Id.* The Board relied on the adverse credibility determination and dismissed the appeal. *Id.* at 627.

In denying the petition for review, the Fifth Circuit reasoned that the alien's conflicting and unexplained testimony supported the determination that he did not establish his identity, so his claims for asylum and withholding necessarily failed. *Id.* The court further explained that although the CAT claim was analytically distinct from asylum or withholding of removal claims, the adverse credibility finding, particularly with regard to his identity, adequately supported the denial of CAT. *Id.* at 628.

Ibrahim v. Ashcroft, 95 F. App'x 666 (5th Cir. 2004).

Focus issues: Identity and credibility, corroboration.

The alien claimed to be a native of Somalia and member of the minority Benadiri clan. *Id.* at 667. The IJ denied his applications for asylum, withholding of removal, and CAT. *Id.* The Board concluded the alien did not satisfy his burden of proof because he did not adequately corroborate his identity with documentary evidence, and the Board dismissed his appeal. *Id.* The Fifth Circuit gave deference to the agency's credibility determinations and denied the petition for review. *Id.*

Sixth Circuit

Ndah v. Holder, 512 F. App'x 557 (6th Cir. 2013).

Focus issues: Identity and credibility, corroboration.

The alien, a citizen of Cameroon, alleged he was persecuted by the authorities on account of his political activities. *Id.* at 559. The IJ made an adverse credibility determination and denied asylum and withholding of removal. *Id.* The Board affirmed the adverse credibility finding based on the alien's failure to establish his identity. *Id.* at 561. The Board relied on three discrepancies in the testimony and evidentiary record: the alien's date of birth, whether he was married and had a child in Cameroon, and his profession. *Id.* at 561–62. The Board further reasoned that the alien failed to provide adequate explanations for these inconsistencies. *Id.* Although the IJ and the Board were troubled that the ICE attorney did not follow through with

his representation that he would have the documents forensically examined, the Board noted the alien had the burden of proof and failed to authenticate his documents. *Id.* at 562.

The Sixth Circuit rejected the alien's argument that his birth date, marital status, and profession were irrelevant to whether he established eligibility for relief. *Id.* at 562. The court acknowledged these biographical facts did not pertain to the alien's past persecution or fear of future persecution but, more fundamentally, they called into question whether the alien was the person he claimed to be. *Id.* at 562–63. The court also noted the lack of authenticated documents made it more difficult for the alien to adequately establish his identity. *Id.* at 563. The court therefore denied the petition for review. *Id.* at 565.

Mbaye v. Holder, 369 F. App'x 688 (6th Cir. 2010).

Focus issues: Identity and credibility, corroboration.

The alien claimed to be Mauritanian. *Id.* at 690. The IJ designated Mauritania as the country of removal and postponed proceedings because the alien did not provide identity documentation. *Id.* at 691. The alien later submitted documents that she claimed she had when she entered the United States: a certificate of nationality, a national identity card, and an uncertified birth certificate issued nineteen years after her birth. *Id.* The IJ found the certificate of nationality and national identity card facially questionable because they indicated the alien's residency in Nouakchott, where the alien claimed she never lived, and the IJ also found that the witness's testimony about the alien's residency lacked credibility. *Id.* The IJ made an adverse credibility determination based in part on doubts surrounding the identity documents. *Id.* at 692. The IJ denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* The Board affirmed. *Id.*

The alien subsequently filed a motion to reopen with the Board. *Id.* at 692. In denying the motion, the Board determined the alien did not rebut the adverse credibility finding or address the IJ's finding that the alien did not establish identity. *Id.* at 693. In denying the petition for review, the Ninth Circuit reasoned the alien failed to establish *prima facie* eligibility for relief due to her lack of credibility. *Id.* at 697. The court did not address the question of the alien's nationality. *Id.*

Sy v. Gonzales, 199 F. App'x 444 (6th Cir. 2006).

Focus issue: Identity and credibility.

The alien testified that he was born in Mauritania. *Id.* at 445. He submitted a Mauritanian nationality certificate and Mauritanian birth certificate excerpt and claimed his sister obtained the documents from their parents' home in Mauritania. *Id.* at 446. The DHS submitted the documents to an INS forensics laboratory but did not receive the analysis before the merits hearing. *Id.* During cross-examination, the alien provided responses that indicated he was unfamiliar with the geography of the country in general and, in particular, the city in which he claims he was arrested, but he also exhibited some knowledge of the country. *Id.* at 446–47. In

granting the alien's asylum claim, the IJ explained he was convinced the alien was Mauritanian even if his knowledge of Mauritanian geography was a "mixed bag." *Id.* at 447.

Shortly thereafter, ICE received a report from the forensics examiner that concluded the alien's documents were fraudulent. *Id.* at 445. Based on this evidence, ICE moved to reopen removal proceedings and terminate the asylum grant. *Id.* The IJ reopened proceedings and the forensics examiner offered testimony that the documents were falsified. *Id.* at 447. The alien's testimony regarding how his sister obtained the documents conflicted with his earlier testimony, and he presented a new certificate of nationality and birth certificate that differed significantly from the first set. *Id.* The IJ noted the alien's "vacillating, weak" explanations and gave no weight to the new documents because they were unauthenticated and inconsistent with the previous documents. *Id.* at 448. The IJ then rescinded the original asylum grant, denied his renewed application, and ordered him removed to Mauritania. *Id.* The Board affirmed. *Id.* at 445.

The Sixth Circuit distinguished the case from *Kourski v. Ashcroft*, 355 F.3d 1038, 1040 (7th Cir. 2004) (holding that a falsified document cannot be the sole basis of an adverse credibility determination where the alien had no reason to believe the document was false). *Sy*, 199 F.App'x at 448-49. The court noted that the alien submitted at least two counterfeit documents, not just one. *Id.* at 449. The court further determined the alien should have known the false nature of the documents due to their fake appearance, his internally inconsistent explanations, and his submission of new documents when the first set was called into question. *Id.* at 449. Accordingly, the Sixth Circuit upheld the adverse credibility determination and denied the petition for review. *Id.* at 450.

Seventh Circuit

No cases.

Eighth Circuit

Doumegno v. Lynch, 640 F. App'x 571 (8th Cir. 2016).

Focus issues: Identity, in general, and credibility.

The alien asserted that she was a native and citizen of Togo who obtained a Beninese birth certificate and passport under a different name. *Id.* at 572. She entered the United States using the Beninese passport and filed an affirmative asylum application as a native and citizen of Togo under the name Akofa Christine Doumegno, submitting documents related to her alleged Togolese identity and Beninese alias. *Id.* at 572–73. The asylum office referred her application to the Immigration Court, and the IJ determined the alien had the burden of establishing her identity and must rebut the presumption that her Beninese passport indicated her true identity. *Id.* at 573. The alien presented evidence from the woman named in the Beninese documents. *Id.* The IJ found the alien's claim that she was from Togo lacked credibility because the alien's

account of obtaining the identity card was implausible and the card was not certified according to Togolese regulations. *Id.* at *574. The IJ also concluded the alien did not meet her burden to prove her identity was different than that in the Beninese passport, and the IJ sua sponte found the alien removable for committing fraud. *Id.* at *573. The Board adopted the IJ's reasoning and dismissed the appeal, concluding the IJ had not committed clear error in finding the alien did not meet her burden of establishing her identity as Doumengo and her Togolese nationality and citizenship. *Id.*

The Eighth Circuit held that the IJ and Board did not commit legal error in stating or applying the burden of proof regarding identity and nationality because these issues were legitimately in question. *Id.* at 574. The court denied the petition for review, holding that substantial evidence supported the IJ's determination of the alien's credibility, identity, and nationality. *Id.* at 575. The court reasoned that the IJ had weighed the evidence and did not treat the Beninese passport as *per se* conclusive evidence. *Id.* at 574.

Ninth Circuit

Wang v. Lynch, 629 F. App'x 778 (9th Cir. 2015).

Focus issue: Identity and credibility.

The alien, a citizen of China, provided conflicting testimony regarding when and how he obtained his passport, and the U.S. government was unable to verify the authenticity of many of his documents. *Id.* at 779–80. The IJ determined he did not provide credible evidence and denied his applications for asylum, withholding of removal, and CAT. *Id.* The Board summarily affirmed. *Id.* at 780. In denying the petition for review, the Ninth Circuit concluded substantial evidence supported the adverse credibility determination. *Id.*

Sidhu v. Lynch, 606 F. App'x 373 (9th Cir. 2015).

Focus issues: Identity and credibility, frivolous finding.

The IJ concluded the alien failed to establish his identity because the record indicated he had used a different name on his daughter's birth certificate, his corrected asylum application, his passport, his nonimmigrant visa applications, and his attorney's Notice of Entry of Appearance form that he signed. *Id.* at 373. The IJ made an adverse credibility determination, denied his applications for asylum, withholding of removal, and CAT, and found his asylum application to be frivolous. *Id.* The Board affirmed. *Id.*

In upholding the adverse credibility determination and denying the petition for review, the Ninth Circuit noted the significant overlapping biographical information on the alien's nonimmigrant visa applications supported the IJ's finding that he filed the applications. *Id.* at 374. The court also upheld the frivolous finding and noted the alien's identity was a material element of his asylum application and he had more likely than not fabricated his identity. *Id.*

De Vos v. Holder, 599 F. App'x 705 (9th Cir. 2015).

Focus issue: Identity and credibility.

The alien filed with the Board a motion to reopen proceedings based on changed country conditions in Sri Lanka. *Id.* at 705. The Board denied his motion. *Id.* The Ninth Circuit explained the alien's motion to reopen did not challenge the IJ's adverse credibility determination that the court previously upheld. *Id.* at 706. In denying the petition for review, the court reasoned the adverse credibility determination involved key elements of his claim, such as his identity. *Id.* at 706.

Arbani v. Holder, 578 F. App'x 629 (9th Cir. 2014).

Focus issue: Identity and credibility.

The alien submitted documents with different names, such as two genuine passports and a false passport containing a false U.S. entry stamp. *Id.* at 629. The IJ concluded the alien did not provide an adequate explanation for the inconsistencies, made an adverse credibility determination, and denied the alien's applications for withholding of removal and CAT. *Id.* The Board affirmed. *Id.* In denying the petition for review, the Ninth Circuit suggested the IJ's finding that the alien did not establish his identity would have provided sufficient support for the adverse credibility finding, although in this instance the IJ also found inconsistencies in the record regarding the alien's alleged role and membership in a political organization. *Id.*

(Sukhwinder) Singh v. Holder, 570 F. App'x 644 (9th Cir. 2014).

Focus issue: Identity and credibility.

The IJ made an adverse credibility determination based in part on inconsistencies in the record regarding the alien's age and place of birth. *Id.* at 645. The IJ denied his applications for asylum, withholding of removal, and CAT, and the Board affirmed. *Id.* In denying the petition for review, the Ninth Circuit concluded these inconsistencies cast doubt on the alien's identity and sufficiently supported the adverse credibility finding. *Id.*

Demirchian v. Holder, 552 F. App'x 780 (9th Cir. 2014).

Focus issue: Identity and credibility.

The aliens claimed they were subject to persecution in Georgia and the "Advocacy Bureau" had their documents. *Id.* The DHS submitted forensic reports refuting the existence of the Bureau and the aliens' identity documents. *Id.* The IJ gave the aliens time to collect evidence of their identities, rebut the DHS' contrary forensic evidence, and explain identified inconsistencies in the record. *Id.* The IJ made an adverse credibility determination and denied their applications for relief, and the Board affirmed. *Id.* In denying the petition for review, the Ninth Circuit concluded the aliens' failure to credibly establish their identities went to the heart of their claim. *Id.*

Dhaliwal v. Holder, 525 F. App'x 588 (9th Cir. 2013).

Focus issues: Identity and credibility, frivolous finding.

The IJ made an adverse credibility finding, denied the alien's applications for asylum and withholding of removal, and determined the asylum application was frivolous. *Id.* at 589–90. In dismissing the appeal, the Board discussed specific inconsistencies in the alien's testimony, asylum application, and documentary evidence that cast substantial doubt on his identity and other aspects of his claims. *Id.* at 590. In denying the petition for review, the Ninth Circuit upheld the adverse credibility finding and frivolous finding. *Id.* The court explained that counsel and the IJ attempted to clarify the inconsistencies and fraudulent aspects of his application, but the alien's proffered explanations were inadequate. *Id.*

Shahinyan v. Holder, 518 F. App'x 545 (9th Cir. 2013).

Focus issues: Identity and credibility, corroboration.

The IJ found that the alien did not establish her identity or that of her two children. *Id.* at 546. The IJ then determined that he could not make a credibility finding or adjudicate the alien's claims, and therefore the IJ denied the alien's applications for asylum and withholding of removal. *Id.* The Board affirmed on the grounds the alien failed to submit objective evidence of her identity or her children's identities. *Id.* In remanding the case, the Ninth Circuit determined that the IJ erred in declining to make an adverse credibility determination or adjudicate the alien's claims because she did not provide non-testimonial proof of her identity. *Id.* It further concluded that the Board failed to correct the IJ's error and further erred, under pre-REAL ID Act case law, in requiring corroborating evidence where the IJ did not make an adverse credibility determination. *Id.*

CONCURRENCE: The concurring opinion lamented that the court was bound by *Tijani v. Holder*, 628 F.3d 1071 (9th Cir. 2010) (holding that, in pre-REAL ID Act cases, IJs could not require corroboration of testimony unless the IJ first found the applicant not credible). The concurrence suggested that the Board should provide an authoritative construction of the regulation so that the court could reassess its precedent under *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005) (holding that where an agency's interpretation was entitled to deference, its reasonable interpretation of a statute trumped a prior judicial construction of the same statute).

(Manjinder) Singh v. Holder, 471 F. App'x 568 (9th Cir. 2012).

Focus issue: Identity and credibility.

The record contained discrepancies as to the alien's age, date of birth, and father's name. *Id.* at 569. The IJ made an adverse credibility finding based on these discrepancies and other inconsistencies in the record, and denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* The Board affirmed. *Id.* at 568. In denying the petition for review, the

Ninth Circuit concluded substantial evidence supported the IJ's adverse credibility findings as to the alien's identity.

Aolin Zhang v. Holder, 447 F. App'x 787 (9th Cir. 2011).

Focus issue: Identity and credibility.

The alien claimed a false identity at his asylum hearing and later denied it. *Id.* at 789. The IJ made an adverse credibility determination and denied his applications for asylum, withholding of removal, and CAT. *Id.* at 788. The Board affirmed. *Id.* In denying the petition for review, the Ninth Circuit concluded the alien's use of a false name and his false statements under oath supported the adverse credibility determination. *Id.* at 788. The court distinguished the alien's circumstances from those in *Akinmade v. INS*, 196 F.3d 951, 955–56 (9th Cir. 1999), and *Turcios v. INS*, 821 F.2d 1396, 1400 (9th Cir. 2010), in which aliens made false statements to immigration officials to gain entry into the United States.

Khosla v. Holder, 419 F. App'x 785 (9th Cir. 2011).

Focus issue: Identity and credibility.

The alien's Canadian and United States asylum applications contained discrepancies with regard to his name, date of birth, and names of his spouse and children. *Id.* at 785. The IJ made an adverse credibility finding and denied the alien's applications for asylum, withholding of removal, and CAT, and the Board affirmed. *Id.* In denying the petition for review, the Ninth Circuit reasoned that the alien's explanations for the inconsistencies did not compel a different conclusion.

Kumar v. Holder, 406 F. App'x 195 (9th Cir. 2010).

Focus issues: Identity and credibility, corroboration.

The IJ made an adverse credibility determination partially based on the alien's failure to provide an original passport or birth certificate, documentary inconsistencies with regard to his father's name, and testimonial discrepancies related to when the alien applied for and received his passport. *Id.* at 197. The IJ then denied his applications for asylum, withholding of removal, and CAT. *Id.* at 196. In dismissing the appeal, the Board pointed to these reasons and noted the lack of "verifiable and obtainable corroborating evidence." *Id.* at 196–97. In upholding the adverse credibility determination and denying the petition for review, the Ninth Circuit concluded the inconsistencies went to the heart of his asylum claim because they concerned his identity, and he also failed to produce corroborating evidence. *Id.* at 197.

Effendy v. Holder, 404 F. App'x 194 (9th Cir. 2010).

Focus issue: Identity and credibility.

The alien's passport and her child's birth certificate contained different names, birth dates, and places of birth. *Id.* at 195. The IJ made an adverse credibility determination and denied her applications for asylum, withholding of removal, and CAT, and the Board affirmed. *Id.* The Ninth Circuit upheld the adverse credibility finding based on these discrepancies and denied the petition for review. *Id.* at 195.

(Renu) FNU v. Holder, 396 F. App'x 338 (9th Cir. 2010).

Focus issue: Identity and credibility.

The alien admitted her first asylum application and its supporting grounds were false, and she also continued to use a false identity for years after entering the United States and obtained false documentation for at least one of her children. *Id.* at 339. The IJ based her adverse credibility determination partially on these grounds and denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* The Board concluded that the adverse credibility finding was based on significant inconsistencies that went to the heart of her asylum claim. *Id.* at 339. In upholding the adverse credibility determination and denying the petition for review, the Ninth Circuit noted identity was a key element of an asylum application. *Id.*

Sultana v. Holder, 387 F. App'x 812 (9th Cir. 2010).

Focus issues: Identity and credibility, corroboration.

The alien entered the United States using a false name, and she used the same false name when she married five years later. *Id.* at 813. Her mother's name on her marriage license differed from her mother's name in the alien's asylum application. *Id.* The IJ denied the alien's asylum application as untimely, made an adverse credibility finding, and denied the applications for withholding of removal and CAT. *Id.* The Board affirmed. *Id.* In denying the petition for review, the Ninth Circuit upheld the adverse credibility determination based on inconsistencies with regard to the alien's identity and the alien's failure to corroborate her identity. *Id.*

(Baldev) Singh v. Holder, 380 F. App'x 670 (9th Cir. 2010).

Focus issue: Identity and credibility.

The DHS presented evidence that the alien entered the United States under a different name, and the alien testified he was not the same individual despite fingerprint evidence to the contrary. *Id.* at 671. The IJ made an adverse credibility determination based on the alien's inconsistent testimony with regard to his identity and denied the applications for asylum, withholding of removal, and CAT. *Id.* The Board affirmed. *Id.*

The alien argued that his due process rights were violated because the IJ did not allow the alien to testify regarding details of his alleged persecution. *Id.* In denying the petition for review, the Ninth Circuit explained the alien failed to raise an argument before the Board with regard to the adverse credibility finding. *Id.* at 672. The court also reasoned that there was no due process violation because the IJ based the credibility determination on the alien's inconsistent testimony about his identity. *Id.* at 671–72.

Galustian v. Holder, 361 F. App'x 738 (9th Cir. 2009).

Focus issue: Identity and credibility.

The alien submitted a driver's license that a forensic expert's testimony and report indicated was false. *Id.* at 739. The IJ made an adverse credibility determination and denied her applications for asylum, withholding of removal, and CAT, and the Board affirmed. *Id.* The Ninth Circuit concluded the genuineness of the identity document went to the heart of her claim and thus supported the adverse credibility determination. *Id.* The court denied her petition for review. *Id.*

(Amrit) Singh v. Holder, 352 F. App'x 202 (9th Cir. 2009).

Focus issue: Identity and credibility.

The IJ made an adverse credibility finding and denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* at 203. The Board affirmed. *Id.* In denying the petition for review, the Ninth Circuit noted that proof of identity constituted a central element of the alien's claims for relief, and the court reasoned that the IJ reasonably relied on discrepancies in the alien's driver's license and his testimony about his school matriculation document in making the adverse credibility determination. *Id.* at 204.

(Ranjit) Singh v. Holder, 343 F. App'x 184 (9th Cir. 2009).

Focus issue: Identity and credibility.

The alien submitted a fraudulent identity document and provided inconsistent testimony as to how he obtained it. *Id.* at 184. The IJ made an adverse credibility determination and denied the alien's applications for asylum and withholding of removal. *Id.* The Board affirmed the IJ's decision and also denied the alien's motion to remand. *Id.* In upholding the adverse credibility determination, the Ninth Circuit explained the alien did not establish eligibility for asylum or withholding of removal in the absence of credible testimony. *Id.* The court also explained it lacked jurisdiction to consider the alien's argument that he was unaware his driver's license contained an altered photograph because he failed to raise this issue before the Board. *Id.* Finally, the court upheld the Board's denial of the motion to remand because the alien did not submit previously unavailable evidence of his identity. *Id.*

(Ishwarpal) Singh v. Holder, 340 F. App'x 378 (9th Cir. 2009).

Focus issue: Identity and credibility.

The alien admitted he lied in his initial asylum application about his birth date, entry date into the United States, arrest and harm in India, and period of work in the Punjab. *Id.* at 380. The IJ denied his asylum application as time-barred, made an adverse credibility determination, and denied his applications for withholding of removal and CAT. *Id.* The Board affirmed. *Id.* The Ninth Circuit determined the inconsistencies went to the heart of his claims, upheld the adverse credibility determination, and denied the petition for review. *Id.*

Xiantong Lan v. Holder, 327 F. App'x 27 (9th Cir. 2009).

Focus issue: Identity and credibility.

The alien entered the United States on a passport and visa bearing his photograph and a different name. *Id.* at 29. The alien testified the name belonged to his brother and his brother obtained the documents for him without his knowledge. *Id.* He provided a Chinese birth certificate issued after his arrival in the United States, and the document contained his photograph as an adult. *Id.* The alien could not explain how he obtained the document. *Id.* The IJ made an adverse credibility determination based on the alien's failure to establish his identity and denied the applications for asylum, withholding of removal, and CAT. *Id.* at 28. The Board affirmed. *Id.*

The Ninth Circuit distinguished the case from *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999) (concluding the alien's lies about his involvement in forging a passport or obtaining his airline ticket were insufficient to support an adverse credibility finding where the conduct was "incidental" to his claimed persecution), explaining that the alien here did not establish his identity or that his passport and visa were false. *Xiantong Lan*, 327 F. App'x at 29. In upholding the adverse credibility finding and denying the petition for review, the court reasoned that the inconsistencies between the documents went to the heart of the asylum claim. *Id.*

DISSENT: The dissent would have concluded the adverse credibility determination was based on speculation and conjecture and granted the petition for review.

(Harvinder) Kaur v. Mukasey, 304 F. App'x 602 (9th Cir. 2008).

Focus issue: Identity and credibility.

The IJ made an adverse credibility finding and denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* at 603. The Board affirmed. *Id.* In denying the petition for review, the Ninth Circuit noted the alien's identity was a central element of her claims for relief, and the alien's inconsistent testimony as to how she obtained the passport she submitted sufficiently supported the adverse credibility determination. *Id.* at 604.

Mohamed v. Mukasey, 301 F. App'x 586 (9th Cir. 2008).

Focus issue: Identity, in general.

In denying the alien's applications for relief, the IJ indicated that section 208(d)(5) of the Act, as amended by IIRIRA, required the alien to establish her identity. *Id.* at 587. The Board affirmed. *Id.* The Ninth Circuit concluded that, like the IJ in *Kalouma v. Gonzales*, 512 F.3d 1073, 1078 (9th Cir. 2008), the IJ erred in imposing a burden on the alien regarding her identity. *Mohamed*, 301 F. App'x at 587. The court remanded for analysis apart from the erroneous considerations under section 208(d)(5) to the Act. *Id.*

Singh Bains v. Mukasey, 298 F. App'x 600 (9th Cir. 2008).

Focus issue: Identity and credibility.

The alien admitted that he used a false identity at several prior hearings before the Immigration Court and knowingly submitted fraudulent documents to the Immigration Court and various immigration officials. *Id.* The IJ made an adverse credibility determination and denied his applications for asylum, withholding of removal, and CAT, and the Board summarily affirmed. *Id.* The Ninth Circuit upheld the adverse credibility finding and denied the petition for review. *Id.*

Ibeagwa v. Mukasey, 287 F. App'x 7 (9th Cir. 2008).

Focus issues: Identity and credibility, corroboration.

The alien asserted that he was persecuted by the Nigerian government for his participation in the Ijaw Youth Council, a dissident political group. *Id.* at 8. The IJ made an adverse credibility determination on multiple grounds and found that the alien did not submit adequate corroborating evidence. *Id.* at 8. The IJ denied his applications for asylum, withholding of removal, and CAT. *Id.* The Board summarily affirmed. *Id.* at 11.

The Ninth Circuit upheld the adverse credibility determination and stated it was “far more damning than most cases” in that the IJ did not believe the documents pertained to the alien, so separate consideration of the other documents would not affect the CAT denial. *Id.* at 10–11. The court also rejected the alien's argument that the IJ impermissibly considered the lack of corroborating evidence because the IJ indicated it was the government's burden. *Id.* at 9–11. The court acknowledged the IJ indicated he expected the DHS to rebut the alien's testimony regarding his identity as the son of a prominent village chief, but the court also pointed out the IJ told the alien he should corroborate his identity. *Id.* at 10–11. The court denied the petition for review. *Id.* at 11.

(Bahadur) Singh v. Mukasey, 265 F. App'x 497 (9th Cir. 2008).

Focus issue: Identity and credibility.

The IJ made an adverse credibility finding and denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* at 498. The Board affirmed. *Id.* In denying the petition for review, the Ninth Circuit determined the credibility determination was adequately supported by the alien's "inability to conclusively demonstrate his true identity as a Sikh," which went to the heart of his asylum claim. *Id.*

(Jasbinder) Singh v. Mukasey, 262 F. App'x 757 (9th Cir. 2007).

Focus issues: Identity and credibility, corroboration.

The alien claimed to be an adherent of Sikhism but appeared before the IJ "with short hair, clean shaven, without a knife and without a bracelet, and provided conflicting testimony regarding his appearance." *Id.* at 757. The IJ made an adverse credibility determination and denied his applications for asylum, withholding, and CAT. *Id.* The Board affirmed. *Id.* In upholding the credibility determination and denying the petition for review, the Ninth Circuit concluded the IJ had reason to question the alien's identity and also explained that his corroborating documents introduced additional inconsistencies regarding his identity and religious adherence. *Id.*

(Harmandip) Singh v. Mukasey, 254 F.App'x 708 (9th Cir. 2007).

Focus issue: Identity and credibility.

The IJ denied the alien's applications for asylum, withholding, and CAT based on an adverse credibility determination, and the Board affirmed. *Id.* at 709. In denying the petition for review, the Ninth Circuit concluded the alien's submission of a fraudulent driver's license and failure to otherwise establish his identity adequately supported the credibility determination. *Id.* The court also determined the alien failed, in light of the credibility determination, to submit independent evidence establishing CAT eligibility. *Id.*

Fofana v. Gonzales, 238 F.App'x 324 (9th Cir. 2007).

Focus issues: Identity and credibility, corroboration.

The IJ denied the alien's applications for asylum, withholding, and CAT. *Id.* at 325. The Board affirmed based on the adverse credibility determination because the alien's testimony did not establish his identity and nationality. *Id.* at 325. In upholding the adverse credibility determination and denying the petition for review, the Ninth Circuit explained the alien also failed to provide "non-duplicative, material, easily-available" corroborating evidence of his identity and nationality. *Id.*

Zokota v. Gonzales, 225 F. App'x 445 (9th Cir. 2007).

Focus issue: Identity and credibility.

The alien claimed to have a mixed national identity and asserted the Ukrainian government refused to issue her a passport. *Id.* at 447. The IJ made an adverse credibility finding based partially on discrepancies between her testimony and documentary evidence, namely, her Ukrainian passport. *Id.* at 446. The IJ denied her applications of asylum, withholding of removal, and CAT, and the Board affirmed. *Id.* In denying the petition for review, the Ninth Circuit upheld the IJ's finding that the alien entered the United States on a Ukrainian passport and reasoned the inconsistencies about her entry went to the heart of her claim. *Id.* at 446–47.

(Manjinder) Kaur v. Gonzales, 218 F. App'x 624 (9th Cir. 2007).

Focus issues: Identity and credibility, corroboration.

The IJ made an adverse credibility determination and alternatively found that the alien failed to prove her identity, in that she did not provide testimony from her American relatives. *Id.* at 626–28. The IJ denied her applications for asylum, withholding, and CAT. *Id.* at 626. The Board summarily affirmed. *Id.* In remanding the case, the Ninth Circuit held that the IJ erred in its adverse credibility determination and further concluded that, in light of the alien's credible testimony, the IJ erred in denying her applications based on the finding that she failed to prove her identity. *Id.* at 628. The court reasoned that the alien bolstered her testimony with several corroborating documents including a notarized birth certificate, a letter from her father, a letter from the village leader, a birth certificate for her brother confirming they shared the same parents, and a school record. *Id.*

(Harsimran) Singh v. Gonzales, 206 F. App'x 707 (9th Cir. 2006).

Focus issues: Identity and credibility, corroboration.

The alien's testimony conflicted with the only document he presented to establish his identity. *Id.* at 708. The IJ made an adverse credibility determination and denied his applications for asylum, withholding of removal, and CAT, and the Board affirmed. *Id.* In denying the petition for review, Ninth Circuit reasoned the IJ's credibility finding was proper because the alien did not corroborate his testimony. *Id.*

(Kundan) Singh v. Gonzales, 205 F. App'x 504 (9th Cir. 2006).

Focus issue: Identity and credibility.

The alien provided multiple birth dates that differed from the birth date given at his deportation hearing and the date in his Indian documents, and he explained the discrepancy arose from his former counsel's error. *Id.* at 505–06. The IJ made an adverse credibility determination and denied his applications for asylum, withholding of removal, and CAT. *Id.* at 505. The Board affirmed. *Id.* In denying the petition for review, the Ninth Circuit noted that even though a different conclusion could be drawn from the evidence and the alien's explanation, the finding

was nonetheless supported by substantial evidence. *Id.* at 506.

Sarai v. Gonzales, 202 F. App'x 982 (9th Cir. 2006).

Focus issues: Identity and credibility, corroboration.

As proof of his identity, the alien submitted only a voter identification card that conflicted with his testimony regarding his age and did not list his surname. *Id.* at 983. Three years prior to the hearing, the IJ asked the alien to submit additional corroborating identification, which he failed to provide. *Id.* The IJ denied the alien's applications for asylum, withholding of removal, and CAT, and the Board affirmed based on the adverse credibility determination. *Id.* at 983. In denying the petition for review, the Ninth Circuit upheld the adverse credibility finding. *Id.* at 983–84.

(Rashpal) Singh v. Gonzales, 187 F. App'x 751 (9th Cir. 2006).

Focus issue: Identity and credibility.

The IJ made an adverse credibility finding and denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* at 752. The Board affirmed. *Id.* In upholding the credibility finding and denying the petition for review, the Ninth Circuit concluded that the alien's testimony about his Indian marriage certificate went to the heart of his asylum application because it concerned his identity. *Id.*

Azabo v. Gonzales, 152 F. App'x 690 (9th Cir. 2005).

Focus issues: Identity and credibility, frivolous finding.

The alien, a native of Iraq, claimed he was drafted in the Iraqi military in 1996 and was jailed and tortured for allegedly helping a political prisoner escape. *Id.* at 691–92. The INS presented contradictory evidence that he had applied for refugee status in 1994 with UNHCR in Turkey after fleeing military service. *Id.* at 692. The alien explained the UNHCR refugee application was the result of his cousin stealing his identity. *Id.* He provided a few photographs and a faxed letter to support his testimony but admitted the photograph in the application resembled him, not his cousin. *Id.* The IJ made an adverse credibility determination, found that he filed his asylum application frivolously, and denied his applications for asylum, withholding of removal, and CAT. *Id.* at 691. Board summarily affirmed. *Id.* at 692.

In upholding the adverse credibility finding, the Ninth Circuit determined the alien's evidence did not compel a different conclusion. *Id.* at 692. The court also upheld the frivolous finding because some of the material elements appeared to be deliberately fabricated and the alien was provided with opportunities to explain the implausible aspects and discrepancies in his claim. *Id.* at 692–93.

Abdulkerim v. Gonzales, 137 F. App'x 99 (9th Cir. 2005).

Focus issue: Identity and credibility.

The alien submitted a fraudulent birth certificate. *Id.* at 100. The IJ denied his applications for asylum, withholding of removal, and CAT. *Id.* The Board conducted a de novo review of the record and concluded the alien's fraudulent birth certificate supported an adverse credibility determination because his identity went to the heart of his claim. *Id.* The Ninth Circuit upheld the credibility determination and denied the petition for review. *Id.*

(Joginder) Singh v. Gonzales, 134 F. App'x 215 (9th Cir. 2005).

Focus issue: Identity and credibility.

The alien possessed two passports under two different names. *Id.* at 215. The IJ found the alien's explanation about the passports unconvincing, made an adverse credibility determination, and denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* at 215. The Board summarily affirmed. *Id.* at 215. In denying the petition for review, the Ninth Circuit concluded the adverse credibility determination was supported by the IJ's specific, cogent reasons for doubting the alien's identity. *Id.* at 215–16.

(Parminder) Kaur v. Gonzales, 124 F. App'x 566 (9th Cir. 2005).

Focus issues: Identity and credibility, corroboration.

The IJ made an adverse credibility finding and denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* at 567. The Board affirmed. *Id.* In denying the petition for review, the Ninth Circuit reasoned that the IJ reasonably found inconsistencies were unresolved where (1) the alien's testimony and her father's affidavit conflicted with regard to her place of marriage and (2) the alien's matriculation certificate and asylum application reflected conflicting graduation dates. *Id.* at 567–68. The court further explained that the two discrepancies involved the alien's identity and, because she was not credible regarding her identity, the IJ did not err in requiring her to provide corroborating evidence of her identity. *Id.*

Bihi v. Gonzales, 121 F. App'x 773 (9th Cir. 2005).

Focus issues: Identity and credibility, frivolous finding.

The alien, a native and citizen of Somalia, offered testimony that was inconsistent with information provided in his asylum application with regard to his name and birth date. *Id.* at 733–34. The IJ made an adverse credibility finding, denied his applications for asylum, withholding of removal, and CAT. *Id.* at 773. The IJ also concluded the alien filed a frivolous asylum application. *Id.* Board affirmed the denial of the applications. *Id.* In affirming the adverse credibility determination and denying the petition for review, the Ninth Circuit

explained the inconsistencies went to the heart of the alien's claims. *Id.* at 774. The court also upheld the frivolous finding. *Id.*

(Seetal) Singh v. Ashcroft, 104 F. App'x 644 (9th Cir. 2004).

Focus issue: Identity and credibility.

The IJ made an adverse credibility determination on numerous grounds and denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* at 645. The Board summarily affirmed. *Id.* In denying the petition for review, the Ninth Circuit upheld the credibility finding in part because the alien did not establish his identity, as he did not provide his original passport and had used a false Hispanic name. *Id.* at 646.

(Charanjit) Singh v. Ashcroft, 88 F. App'x 213 (9th Cir. 2004).

Focus issue: Identity and credibility.

The alien, a native and citizen of India, admitted to lying about his identity in his 1993 asylum application and his work authorization, and he did not correct his name with INS until 1999. *Id.* at 213. The IJ made an adverse credibility determination based on his history of dishonesty and denied his applications for asylum, withholding of removal, and CAT. *Id.* The Board summarily affirmed. *Id.* The Ninth Circuit upheld the adverse credibility determination and denied the petition for review.

Tenth Circuit

No cases.

Eleventh Circuit

Belaj v. Att'y Gen., 128 F. App'x 92 (11th Cir. 2005).

Focus issue: Identity and credibility.

The IJ determined the alien did not provide credible evidence as to his identity and denied the alien's applications for asylum, withholding of removal, and CAT. *Id.* at 92. The Board affirmed. *Id.* In denying the petition for review, the Eleventh Circuit concluded the alien failed to establish his nationality and identity and failed to testify credibly. *Id.*

Who are You? – Identity Issues in Immigration: Published Circuit Court Case Summaries

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First Circuit

Ahmed v. Holder, 765 F.3d 96 (1st Cir. 2014).

Focus issues: Identity and credibility, corroboration.

In this pre-REAL ID Act case, a Somali national applied for asylum. *Id.* at 98, 100. Five years later, he traveled to Canada and applied for asylum under a different name and a somewhat different claim. *Id.* at 98. The alien returned to the United States and, while in removal proceedings, he filed a new application requesting asylum, withholding of removal, and CAT based on his fear of persecution on yet another basis. *Id.* at 99. The IJ made an adverse credibility determination and denied his applications, and the Board affirmed. *Id.* In denying the petition for review, the First Circuit noted the alien's pseudonymous Canadian asylum application cast doubt as to his true identity, and his identity was at the heart of his asylum claim. *Id.* at 100. The court also explained that flawed credibility was not necessarily fatal to relief, but the lack of corroborating evidence in this case was properly considered by the agency and supported the denial of his applications. *Id.* at 101.

Khan v. Mukasey, 541 F.3d 55 (1st Cir. 2008).

Focus issues: Identity and credibility, corroboration.

The alien, a native and citizen of Pakistan, purportedly entered the United States using a passport with a false name and subsequently sought asylum in Canada. *Id.* at 56. After Canada denied his asylum application, he reentered the United States and was detained at the border. *Id.* He claimed the Canadian government confiscated his true passport, and he submitted a copy of the passport to the Immigration Court. *Id.* He did not submit an official record of his entry into Canada or his Canadian asylum application. *Id.* The IJ found that, as a threshold matter, he did not establish his identity, and the IJ also made an adverse credibility determination. *Id.* at 56–57. The IJ denied his applications for asylum, withholding, and CAT. *Id.* at 56. The Board did not adopt the IJ's decision and denied his applications based on his uncorroborated testimony. *Id.* at 57. In denying the petition for review, the First Circuit noted identity was a threshold issue, and it reasoned the absence of corroborating documents was particularly significant in this case because Canada was a friendly government and the alien originally entered the United States under a false name. *Id.* at 57–58.

Second Circuit

Urgen v. Holder, 768 F.3d 269 (2d Cir. 2014).

Focus issues: Identity and credibility, country of removal.

The alien affirmatively applied for asylum, withholding of removal, and CAT, asserting he was a stateless Tibetan born in Nepal. *Id.* at 271. He supported his application with numerous documents pertaining to his identity, which included a Green Book (Tibetan identity certificate). *Id.* The DHS submitted his visa and Nepalese passport to the U.S. Department of State Forensic Document Laboratory, which noted the passport's security features were consistent with other Nepal passports and did not appear to be altered. *Id.* The laboratory also confirmed the visa was genuine. *Id.* The DHS then issued a Notice to Appear alleging the alien was a native and citizen of an unknown country. *Id.* The alien conceded removability before the IJ and declined to designate a country of removal, and the DHS designated Nepal. *Id.* IJ made an adverse credibility determination, accorded diminished weight to his Green Book and letter from his parents, concluded he did not credibly establish he was a stateless Tibetan born in Nepal, and denied his applications for relief. *Id.* at 272. The IJ indicated she did not know whether he was a Tibetan or Nepali but nevertheless ordered him removed to Nepal. *Id.* The Board affirmed the IJ's denial of relief solely because the documentary evidence did not establish the alien's Tibetan nationality. *Id.* at 271–72.

In granting the petition for review, the Second Circuit held that the threshold issue of an alien's nationality or lack of nationality need not be established through non-testimonial evidence. *Id.* at 273. The court then vacated the Board's decision and remanded the case for reconsideration of the adverse credibility determination. *Id.* at 271, 273. The court also remanded for an explicit determination to be made concerning the alien's country of nationality and citizenship so his asylum claim with regard to that country could be evaluated and to ensure compliance with statutory requirements governing removal. *Id.* at 273–74.

Niang v. Mukasey, 511 F.3d 138 (2d Cir. 2007).

Focus issues: Identity and credibility, corroboration.

The alien claimed to be a native and citizen of Mauritania. *Id.* at 141. He entered the United States on a Senegalese passport and student visa in the name of Mamadou Ba. *Id.* In his asylum application, he asserted he feared persecution in Mauritania and Senegal. *Id.* The alien submitted a copy of his purported Mauritanian identity document that his father allegedly obtained before his family was expelled from Mauritania. *Id.* at 142–43. He also submitted a Senegalese refugee identity card that he purportedly left at the refugee camp, and he explained Ba obtained it from the refugee camp director and mailed it to him. *Id.* at 143. In determining the identity documents were not genuine, the IJ found the alien's explanation as to how he obtained the Senegalese refugee document "farfetched." *Id.* at 144. The IJ also reasoned the alien inaccurately testified regarding his age in the documents, and his Mauritanian identity

document appeared altered. *Id.* The IJ noted the document also indicated he was a businessman or commercial figure despite his age of eleven when the document was issued. *Id.* The IJ stated the alien's demeanor and the rest of his testimony supported the alien's case, but he made an adverse credibility determination based on the fraudulent documents. *Id.* at 144, 146. The IJ denied the alien's applications for withholding of removal and CAT and pretermitted the asylum application as untimely. *Id.* at 141. The Board adopted and affirmed the IJ's decision. *Id.* at 145.

In vacating the adverse credibility determination, the Second Circuit explained the IJ relied solely on his own finding of document fraud, and the court concluded this finding was based on unjustified assumptions and speculation. *Id.* at 146. The court pointed to problematic aspects of the IJ's reasoning with regard to the fraudulent nature of the documents. *Id.* at 146–47. The court stated that "given the tenuousness of these suspicions, they cannot ground an adverse credibility determination, where petitioner's testimony was otherwise convincing and consistent, and where the IJ stated expressly that he heard nothing that 'sounded made up.'" *Id.* at 147. In rejecting the DHS's argument that the alien provided insufficient corroborating evidence, the Second Circuit explained that credible testimony may be sufficient on its own to sustain the burden of proof, and the court also noted the alien provided documentary evidence of his persecution. *Id.* at 148. Accordingly, the court remanded the case. *Id.* at 149.

Wangchuck v. Dep't of Homeland Sec., 448 F.3d 524 (2d Cir. 2006).

Focus issues: Identity, in general, and country of removal.

The alien, a Buddhist monk, was born in India to Tibetan refugee parents. *Id.* at 526. He applied for asylum, withholding of removal, and CAT as to India, and he submitted a refugee registration certificate from the Indian government and an identity certificate from the Indian government that permitted him to travel outside India and return if he obtained a "No Objection to Return" stamp. *Id.* Without determining the alien's nationality, the IJ denied asylum, withholding of removal, and CAT and ordered him removed to India or China in the alternative. *Id.* at 527–28, 532. The Board affirmed. *Id.* at 528.

The Second Circuit noted that the determination of an asylum applicant's nationality was central to asylum eligibility analysis, and the court concluded the IJ and the Board erred in failing to make a threshold determination of the alien's nationality. *Id.* at 529. The court also determined that the Board erred in ordering the alien removed, in the alternative, to China without first analyzing whether he was eligible to be removed there according to the statutory factors governing countries for removal. *Id.* at 531–33.

Borovikova v. U.S. Dep't of Justice, 435 F.3d 151 (2d Cir. 2006).

Focus issue: Identity and credibility.

The alien was a native of the former U.S.S.R. and a citizen of Ukraine. *Id.* at 154. She submitted a birth certificate, purportedly issued in Ukraine, that an INS assistant at the United

States embassy in Moscow indicated was fraudulent. *Id.* at 157. The IJ declined to credit the alien's rebuttal evidence because the documents were unauthenticated. *Id.* The IJ made an adverse credibility finding based on the fraudulent document finding and other considerations, and she denied the alien's applications for asylum and withholding of removal. *Id.* at 154. The Board affirmed. *Id.* at 154.

The Second Circuit upheld the IJ's adverse credibility finding, reasoning the IJ provided three grounds that were each sufficient alone to support the finding and the court could not determine that "no reasonable fact-finder could have failed to find the contrary result." *Id.* at 157–161. Therefore, the court denied the petition for review. *Id.*

DISSENT: The dissent concluded the finding that the alien's birth certificate was inauthentic went against the weight of the rebuttal evidence, and the inconsistency grounds were insufficient to support the adverse credibility finding. *Id.* at 162. The dissent explained the IJ's reliance on the INS assistant's affidavit was misplaced because the record did not indicate by what criteria the document was determined to be fraudulent or establish the assistant's forensic expertise in birth certificates reissued in Ukraine. *Id.* The dissent further explained the record was unclear as to whether the assistant examined the original document or a copy. *Id.* at 162. The dissent noted the alien submitted several other documents to corroborate her claim that she was a Ukrainian Jew and the IJ provided no reason to question their authenticity. *Id.* at 162–63. Finally, the dissent reasoned the case was distinguishable from *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998) (holding that where an applicant submitted an identity document that was suspected or found to be counterfeit, the credibility of the entire claim was affected in the absence of an explanation or rebuttal), as the IJ in *Matter of O-D-* relied on a forensics report from the INS Forensic Document Laboratory rather than an assistant's affidavit. *Borovikova*, 435 F.3d at 163.

Dhoumo v. Board of Immigration Appeals, 416 F.3d 172 (2d Cir. 2005).

Focus issue: Identity, in general.

The alien was born in India to Tibetan refugee parents. *Id.* at 173. He denied that he was a native and citizen of India and asserted he was a Chinese national. *Id.* The IJ did not make a nationality finding, did not address his argument that he was a Chinese national, denied his applications for asylum and withholding of removal, and ordered him removed to India. *Id.* at 173–74. The Board summarily affirmed. *Id.* at 174.

In remanding the case for a nationality determination, the Second Circuit stated the "[alien's] nationality, or lack of nationality, was a threshold question in determining eligibility for asylum." *Id.* at 174. The court explained that nationality was a status conferred by a state and was generally recognized by other states if it was supported by a "genuine link" between the individual and the conferring state. *Id.* at 175–76. The court reasoned that the alien presented evidence that China confers nationality on all Tibetan refugees and their descendants who reside outside of China, thus the IJ and the Board erred in failing to address the alien's position regarding his nationality. *Id.*

Third Circuit

No cases.

Fourth Circuit

No cases.

Fifth Circuit

Tesfamichael v. Gonzales, 469 F.3d 109 (5th Cir. 2006).

Focus issue: Identity, in general.

[This case involved two aliens, a husband and wife, but the summary pertains only to the wife's claim.] The alien voted in an Ethiopian referendum on Eritrean independence and asserted that she became a citizen of Eritrea when she filled out the election card. *Id.* at 112. The Ethiopian government subsequently took away her Ethiopian identification card, detained her, and later removed her to Eritrea. *Id.* She claimed she was denied full Eritrean citizenship. *Id.* at 113. The IJ denied her applications for asylum, withholding of removal, and CAT. *Id.* at 113. The Board determined she was a citizen of Eritrea, was firmly resettled there, and failed to establish asylum eligibility with regard to Eritrea. *Id.* at 114–15.

Before the Fifth Circuit, the alien argued her asylum claim should be analyzed with regard to Ethiopia. *Id.* at 114. In denying the petition for review, the court reasoned that the persecution she allegedly faced in Ethiopia was irrelevant because she listed Eritrea as her country of nationality and country of feared persecution in her asylum application, and she never claimed to be an Ethiopian national. *Id.* at 114–15. The court distinguished the case from *Haile v. Gonzales*, 421 F.3d 493 (7th Cir. 2005) (noting a program of denationalization and deportation may be a form of persecution), as the aliens in *Haile* used Ethiopia as their test country and the Seventh Circuit remanded the case so the IJ could determine whether Ethiopia still considered them to be citizens. *Tesfamichael*, 469 F.3d at 115 n.8. The Fifth Circuit also distinguished *Giday v. Gonzales*, 434 F.3d 543 (7th Cir. 2006), in which Eritrea attempted to deport the alien because of her Ethiopian ethnicity. *Tesfamichael*, 469 F.3d at 115 n.8. The Fifth Circuit noted the alien in *Giday* had never been in Ethiopia and was not a national there. *Tesfamichael*, 469 F.3d at 115 n.8.

Sixth Circuit

No cases.

Seventh Circuit

(Tarsem) Singh v. Holder, 749 F.3d 622 (7th Cir. 2014).

Focus issues: Identity and credibility, corroboration.

The alien, a citizen of India, claimed he was detained by the INS when he was fifteen years old. *Id.* at 623. The documentary evidence included copies of birth certificates with two different names (Tarsem Singh and Simranjit Singh), three different translations for the birth certificates, and copies of passports under both names. *Id.* at 624. The documents indicated different dates of birth, and the alien claimed three different dates of entry to the United States. *Id.* The alien was detained by INS in 1997. *Id.* The I-213 indicated he was nineteen years old at the time of his detention, and the alien alleged the date of birth on the I-213 was a transcription error. *Id.* at 624, 627 n.4. The alien claimed that after INS released him, his father created a new identity for him. *Id.* at 624. The alien asserted that his mother in India obtained a new birth certificate and passport for him under the name Simranjit Singh. *Id.* at 624–25. The alien did not appear at his deportation hearing and was ordered deported in absentia. *Id.* at 625.

More than twelve years later, the alien claimed he did not receive notice of the prior hearing and moved to reopen his proceedings. *Id.* In the reopened proceedings, the alien alleged, *inter alia*, that he was fifteen years old at the time of his 1997 detention. *Id.* The IJ concluded the alien’s testimony was unconvincing and lacked persuasive corroboration. *Id.* The IJ further concluded the proceedings had been properly initiated and there was no due process violation. *Id.* The IJ determined the alien was removable and granted voluntary departure. *Id.* The Board affirmed. *Id.*

In denying the petition for review, the Seventh Circuit found that the conflicting documentary evidence did not compel the conclusion that the alien was under eighteen years old when he was detained. *Id.* at 627–28. The court noted that only one immigration official appeared to have conducted a detailed examination of the alien’s conflicting documents, but the official’s determination gave the court “added confidence” in concluding the alien could not establish he was fifteen at the time of his detention. *Id.* at 627 n.5.

Hanaj v. Gonzales, 446 F.3d 694 (7th Cir. 2006).

Focus issues: Identity and credibility, corroboration.

The alien claimed to be an ethnic Albanian born in Kosovo. *Id.* at 695. His documentary evidence included a birth certificate, his membership card from a political party opposed to Serbian rule over Kosovo, and his international driver’s license. *Id.* at 696. The forensic examiner determined the birth certificate was fabricated and the international driver’s license was a counterfeit. *Id.* at 697–98. The IJ relied on *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998) (holding an alien’s presentation of an identification document found to be counterfeit by forensic experts not only discredited the applicant’s claim as to identity and nationality, but

also indicated an overall lack of credibility in the absence of an explanation or rebuttal), and made an adverse credibility finding based on the fraudulent birth certificate. *Id.* at 697–98. The IJ denied the alien’s applications for asylum, withholding of removal, and CAT, and the Board affirmed. *Id.* at 695, 699.

In granting the petition for review, the Seventh Circuit noted the IJ did not make a finding that the alien knew or had reason to know the birth certificate was forged, and the court determined the circumstances were indistinguishable from those in *Kourski v. Ashcroft*, 355 F.3d 1038, 1040 (7th Cir. 2004) (holding that a forged document did not undermine an alien’s credibility absent a finding that the alien knew or had reason to know the document was forged). *Hanaj*, 446 F.3d at 699. The court explained the IJ’s error was “more egregious” than that in *Kourski* because the IJ relied on the fraudulent document to discredit the testimony of all the alien’s witnesses and negate all other corroborating evidence. *Hanaj*, 446 F.3d at 699. The court urged the Board to assign the matter to a different judge on remand. *Id.*

Haile v. Gonzales, 421 F.3d 493 (7th Cir. 2005).

Focus issue: Identity, in general.

Two cases, both involving aliens of Eritrean ethnicity who were born in Ethiopia, were consolidated by the Seventh Circuit. *Id.* at 494–95. In the first case, Tekelu fled Ethiopia and later lost her passport, but was able to obtain an Eritrean passport. *Id.* at 494. The IJ determined she had become a citizen of Eritrea and further concluded that whether Ethiopia recognized her Ethiopian citizenship was within its sovereign authority. *Id.* In the second case, Haile fled Ethiopia, leaving his passport behind, and alleged he was stateless. *Id.* at 495. The IJ determined Haile’s status in Ethiopia was within its authority to determine. *Id.* The IJ did not make a determination with regard to their claimed Eritrean nationalities and denied their applications for asylum, withholding of removal, and CAT. *Id.* at 495–96. The Board affirmed. *Id.*

In granting the petitions for review, the Seventh Circuit noted that a program of denationalization and deportation may constitute persecution, but it declined to determine this issue because the agency did not conclude whether petitioners were still Ethiopian citizens and did not articulate the nationality status of ethnic Eritreans who have left Ethiopia by means other than deportation. *Id.* at 496–97. Thus, the court remanded the cases for additional factual findings regarding the aliens’ nationality and additional consideration of their claims for relief. *Id.* at 497.

Kourski v. Ashcroft, 355 F.3d 1038 (7th Cir. 2004).

Focus issue: Identity and credibility.

The alien asserted that he was persecuted on account of being Jewish. He provided a Russian birth certificate listing his nationality as Jewish, which an expert witness from the INS determined was a forgery. *Id.* at 1038. The alien claimed he was unaware the document was a

forgery. *Id.* The IJ determined he had not rebutted the INS's conclusion, rejected his testimony as lacking credibility, and denied his application for asylum. *Id.* The Board affirmed the IJ's decision, noting the fraudulent document undercut his credibility and he therefore could not meet his burden of proof for asylum. *Id.* at 1039. The Seventh Circuit remanded the case, concluding the IJ's adverse credibility determination was unsupported because the findings did not demonstrate he was aware of the forgery and the document therefore could not undermine his credibility. *Id.* at 1039–40. The court did not reach the question of the alien's nationality.

Eighth Circuit

Fesehay v. Holder, 607 F.3d 523 (8th Cir. 2010).

Focus issues: Identity and credibility, corroboration.

The alien claimed to be an Ethiopian native of Eritrean nationality. *Id.* at 525. She testified she was born in Ethiopia to Eritrean parents and fled to the Netherlands after being assaulted and incarcerated by the Ethiopian government. *Id.* After her asylum application in the Netherlands was denied, she entered the United States on a Dutch passport in the name of Ruth Balay. *Id.* She explained to the IJ that she purchased the Dutch passport because Ethiopia or Eritrea refused to issue her a passport. *Id.* She spoke the primary language of Eritrea. *Id.* at 527. She submitted a baptismal certificate that did not state her nationality and an affidavit from a person who allegedly lived near her in Ethiopia and knew she was Eritrean. *Id.* The IJ made an adverse credibility determination based on inconsistencies in the record and denied her claims for asylum, withholding of removal, and CAT on account of this finding and the alien's lack of "objective, credible" documents corroborating her identity, nationality, ethnicity, or citizenship. *Id.* at 525–26. The Board affirmed on account of "striking inconsistencies" between the alien's Dutch and United States asylum applications. *Id.* at 526.

In denying the petition for review, the Eighth Circuit noted the IJ did not err in rejecting the alien's explanations for the discrepancies in the record. *Id.* at 527. The court also concluded the IJ properly required corroborating evidence of the alien's nationality and adequately supported her determination that the alien's evidence was insufficient to establish her alleged Eritrean nationality. *Id.* at 527–28.

Sow v. Mukasey, 546 F.3d 953 (8th Cir. 2008).

Focus issue: Identity and credibility.

The alien initially denied he was a citizen of Mauritania and later claimed he was a citizen of Mauritania. *Id.* at 955. He submitted two birth certificates, one typed and one handwritten, to the Immigration Court. *Id.* The forensic document examiner attested the handwritten document was likely a forgery. *Id.* The alien testified that he did not have a refugee card from Senegal, though his asylum application referenced a refugee card number. *Id.* He also admitted he provided the police with a false name when he was arrested in the United States. *Id.* The IJ

made an adverse credibility finding on account of his fraudulent birth certificate and other inconsistencies, and denied the applications for asylum, withholding of removal, and CAT. *Id.* The Board affirmed, noting that the alien's failure to establish his Mauritanian citizenship fatally undermined his applications. *Id.* The Eighth Circuit upheld the adverse credibility determination and denied the petition for review. *Id.*

Rafiyev v. Mukasey, 536 F.3d 853 (8th Cir. 2008).

Focus issues: Identity and credibility, frivolous finding.

The alien, a native of Azerbaijan, submitted a birth certificate from the U.S.S.R., a birth certificate from Azerbaijan, the death certificates of two family members from Azerbaijan, a medical record, and a police report to support his applications for asylum, withholding of removal, and CAT. *Id.* at 855. The forensics examiner testified that the U.S.S.R. birth certificate was counterfeit. *Id.* at 856–57. The DHS submitted the results of an investigation by the U.S. embassy in Azerbaijan indicating his Azerbaijan birth certificate and two Azerbaijan death certificates were fraudulent. *Id.* at 857. The alien testified that he was not aware the documents were fabricated and also asserted the Azerbaijan government may have supplied him with counterfeit records to cause trouble for him. *Id.* The IJ found that all six of the alien's documents were fraudulent, concluded the counterfeit documents discredited his overall claim, and determined he filed a frivolous asylum application. *Id.* at 855.

The Board did not adopt certain portions of the IJ's decision, but the Board concluded the alien did not raise meritorious challenges to the IJ's findings that four of his submitted documents were fraudulent. *Id.* at 856. The Board therefore upheld the adverse credibility finding and frivolous finding and dismissed the appeal. *Id.* In affirming the Board's decision, the Ninth Circuit concluded the agency reasonably declined to accept the alien's explanation for the discrepancies in the disputed documents, and the court determined the alien failed to exhaust the frivolousness issue before the Board. *Id.* at 858–59.

Averianova v. Mukasey, 509 F.3d 890 (8th Cir. 2007).

Focus issues: Identity and credibility, corroboration.

Two aliens, citizens of Uzbekistan, sought asylum and withholding of removal due to alleged persecution on account of their Jewish ethnicity. *Id.* at 892. They submitted copies of several birth certificates to corroborate their Jewish ethnicity and explained their original identity documents were lost or stolen. *Id.* at 893. The INS investigated the birth certificates in conjunction with the U.S. embassy in Tashkent, Uzbekistan, and described discrepancies that cast doubt on their authenticity. *Id.* The aliens asserted the IJ should not trust the INS investigation because Uzbek officials may have altered or provided incorrect documents, and their expert witness provided testimony that the former Soviet Union may have systemic record-keeping errors. *Id.* at 896. The aliens also initiated a court proceeding in Tashkent to amend their father's birth certificate to indicate his Jewish ethnicity. *Id.* at 893–94. The IJ examined photographic evidence submitted by INS and determined its investigation was

trustworthy, then found that four birth certificates were fraudulent. *Id.* He found the aliens did not provide sufficient explanations for the discrepancies. *Id.* at 896. He concluded the aliens lacked credibility because they submitted fraudulent birth certificates and he further determined that, absent credible proof of their Jewish ethnicity, their claims for asylum and withholding of removal failed. *Id.* at 895.

In affirming the IJ's decision, the Board affirmed the adverse credibility finding and concluded the determination tainted the alien's overall credibility. *Id.* at 894. The Board did not extend comity to the quasi-administrative decision from Tashkent because it was initiated after asylum proceedings began and because fraud and manipulation of the immigration laws were present. *Id.* at 896.

In denying the petition for review, the Ninth Circuit distinguished *Kourski v. Ashcroft*, 355 F.3d 1038, 1040 (7th Cir. 2004) (holding that a falsified document could not be the sole basis of an adverse credibility determination where the alien had no reason to believe the document was false). *Averianova*, 509 F.3d at 895–96. The court explained the IJ in this case made explicit findings regarding the fraudulent nature of the documents and the aliens' lack of explanation, similar to the IJ in *Ignatova v. Gonzales*, 430 F.3d 1209 (8th Cir. 2005) (upholding a frivolous filing determination where the IJ explicitly found the document to be fraudulent and where the alien did not provide an explanation). *Averianova*, 509 F.3d at 896–97. The court further determined the aliens failed to provide sufficient corroborating evidence of their Jewish ethnicity, as the only other evidence of their ethnicity was the Tashkent decision, to which the court declined to extend comity for the same reasons articulated by the Board. *Id.* at 896.

NOTE: This case does not involve a frivolous filing determination. The court cited *Ignatova*, which reviewed a frivolous filing determination, as an example of a case in which the facts were meaningfully different than those in *Kourski*. *Averianova*, 509 F.3d at 895–97.

Diallo v. Mukasey, 508 F.3d 451 (8th Cir. 2007).

Focus issue: Identity and credibility.

The alien claimed to be a native of Sierra Leone who was persecuted on account of her political activities. *Id.* at 453. She applied for asylum, withholding of removal, and CAT, and submitted a birth certificate that a government investigation later determined was a forgery, an identity card that the IJ found appeared to be altered, and bus records that contradicted her alleged travel dates. *Id.* at 453–55. The IJ made an adverse credibility determination and denied the alien's applications, basing the determination partially on the alien's vague testimony regarding her travels and partially on her documentary evidence. *Id.* at 453. The Board affirmed. *Id.*

The Eighth Circuit dismissed the petition for review, holding that substantial evidence supported the IJ's adverse credibility determination. *Id.* at 454–55. The court distinguished the alien's case from *Kourski v. Ashcroft*, 355 F.3d 1038 (7th Cir. 2004) (holding that a falsified document could not be the sole basis of an adverse credibility determination where the alien had no reason to believe the document was false), reasoning that the IJ did not rely solely on

the false birth certificate. *Diallo*, 508 F.3d at 454–55. The court also explained that, regardless of whether an alien had knowledge of a false identity document, an applicant for relief has the basic burden of establishing her identity and nationality when they are called into question. *Id.* at 454. The court declined to reach the question of whether discrepancies in documents pertaining only to identity and date of birth cannot form the basis for an adverse credibility determination. *Id.* at 455 n.3.

Ninth Circuit

Mengstu v. Holder, 560 F.3d 1055 (9th Cir. 2009).

Focus issue: Identity, in general.

The alien was born in Ethiopia and was of Eritrean descent. *Id.* at 1056. During the war between Ethiopia and Eritrea, the Immigration Office in Ethiopia issued her identity papers titled “Emergency Document of Identity to a non-Ethiopian National who cannot Obtain, or owing to Emergent Circumstances, has no time to Obtain a National Passport or renew an Expired one.” *Id.* at 1057. The document was not valid for reentry to Ethiopia and indicated her nationality was Eritrean. *Id.* She explained to the IJ that the document was issued in lieu of a passport so she could leave the country. *Id.* She declined to designate a country of removal. *Id.* The IJ found that she did not establish a nexus to a protected ground, denied her applications for asylum, withholding of removal, and CAT, and ordered her removed to Ethiopia. *Id.* at 1057–58. The Board summarily affirmed. *Id.* at 1058. The Ninth Circuit remanded for the IJ to make factual findings regarding the alien’s claimed past persecution and well-founded fear of future persecution, but the court did not address whether the IJ properly designated Ethiopia as the country of removal. *Id.* at 1059.

Kalouma v. Gonzales, 512 F.3d 1073, amending and superseding 499 F.3d 1090 (9th Cir. 2007).

Focus issue: Identity and credibility.

The alien was apprehended by the Border Patrol upon entry to the United States and identified himself as a native of Sudan. *Id.* at 1077. He conceded inadmissibility before the IJ, who made an adverse credibility determination and denied his applications for asylum, withholding of removal, and CAT. *Id.* at 1077, 1079–80. The IJ also reasoned that IIRIRA’s 1996 addition of section 208(d)(5) to the Act imposed a new requirement on asylum seekers to establish their identity, and the IJ concluded the information the alien provided about his birth, birthplace, parents, nationality, and religion did not meet this burden. *Id.* at 1077–79. The Board summarily affirmed.

The Ninth Circuit reversed and remanded, clarifying that the amended statute did not impose a heightened standard of proof on aliens regarding their identity. *Id.* at 1079. The court cited

Farah v. Ashcroft, 348 F.3d 1153, 1156 (9th Cir. 2003), and noted that identity was still relevant to a determination of whether an alien has established refugee status. *Kalouma*, 512 F.3d at 1079. Because the court concluded the IJ's skepticism regarding the alien's identity caused him to distort other aspects of his testimony in reaching the adverse credibility determination, it remanded the petition to the Board so the IJ could assess the alien's credibility apart from his assumption of a heightened statutory burden. *Id.* at 1080.

DISSENT: The dissenting judge would have denied the petition based on the IJ's adequately supported credibility determination. *Id.* at 1081. The dissent agreed there was no heightened statutory burden on asylum seekers to establish identity, but would have found the IJ's determination that the alien had not established his identity was sufficient support for the adverse credibility determination. *Id.* at 1080. The judge also would have concluded that the IJ gave substantial, cogent, independent reasons that sufficiently supported the adverse credibility determination. *Id.* at 1080–81.

Hadera v. Gonzales, 494 F.3d 1154 (9th Cir. 2007).

Focus issue: Identity and country of removal.

The alien, born in Italy to parents of Ethiopian ethnicity, became a lawful permanent resident of the United States. *Id.* at 1155–56. At a hearing before the IJ, he asserted he was stateless, had never been to Ethiopia, and declined to designate a country of removal. *Id.* at 1156. The IJ determined he was deportable on account of an aggravated felony conviction and ordered him removed to Ethiopia. *Id.* The Board summarily affirmed. *Id.*

In examining the IJ's designation of Ethiopia as the country of removal, the Ninth Circuit set forth the statutory framework in section 241(b)(2) of the Act, 8 U.S.C. § 1231(b)(2), and the four-step inquiry articulated by the Supreme Court in *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335 (2005). *Id.* at 1156–57. The court determined the IJ erred in designating Ethiopia because he did not find that the alien was a subject, national, or citizen of Ethiopia—rather, the IJ found that Ethiopia likely would not recognize the alien and he may be stateless. *Id.* at 1157–58. Accordingly, the court remanded for a redetermination of the country of removal. *Id.* at 1155.

Farah v. Ashcroft, 348 F.3d 1153 (9th Cir. 2003).

Focus issue: Identity and credibility.

The alien claimed eligibility for asylum on account of his membership in a Somali clan. He presented witnesses who testified regarding his clan and identity, and the IJ found their testimony inconsistent. *Id.* at 1155. The IJ made an adverse credibility determination and denied the alien's applications for relief. *Id.* at 1156. The Board summarily affirmed the IJ's decision. *Id.* The Ninth Circuit found that substantial evidence supported the IJ's adverse credibility determination. *Id.* The court also concluded that the elements of the IJ's credibility findings, including identity, related to key elements of the asylum application. *Id.* Explaining

that “[e]ligibility for asylum depends on the credible establishment of these elements,” it upheld the IJ’s denial of asylum. *Id.*

Tenth Circuit

Kabba v. Mukasey, 530 F.3d 1239 (10th Cir. 2008).

Focus issue: Identity and credibility.

The alien submitted a birth certificate and Sierra Leone identification card that the ICE Forensics Document Laboratories determined were inauthentic. *Id.* at 1242. He also provided a letter from the Sierra Leone Ministry of Internal Affairs verifying he was from Sierra Leone. *Id.* The IJ concluded the birth certificate and identification card were inauthentic and accepted the alien’s explanation that his father obtained them and therefore he was unaware they were inauthentic. *Id.* at 1242–43. The IJ further concluded the alien was a credible witness and granted his asylum application. *Id.* at 1240, 1242.

In reversing the IJ’s decision, the Board concluded the alien was not a credible witness because he submitted fraudulent documents and did not provide a persuasive explanation for the lack of authenticity. *Id.* at 1240, 1243. The Board also noted his testimony was confusing, and the Board determined he lacked credibility as the IJ had found that his testimony contained omissions and inconsistent statements. *Id.* at 1243–44. The Board concluded he was ineligible for asylum and withholding of removal based solely on the adverse credibility determination and remanded for the IJ to enter an order of removal. *Id.* at 1240. One dissenting Board Member noted the inconsistencies were immaterial and the IJ’s credibility determination was not clearly erroneous. *Id.* at 1244. On remand, the IJ ordered the alien’s removal. *Id.*

The Board dismissed the alien’s subsequent appeal. *Id.* The Board reincorporated its prior decision, concluded the IJ’s credibility finding was clearly erroneous, and rejected the unauthenticated letter from the Ministry of Internal Affairs as insufficient to overcome the forensic examiners’ conclusions about the other documents. *Id.* at 1240, 1244. The alien filed a petition for review in which he argued the Board failed to apply a clear error standard of review to the credibility determination. *Id.* at 1244.

In remanding the case, the Tenth Circuit determined the Board failed to apply the clear error standard of review and engaged in fact-finding. *Id.* at 1245–46. Specifically, the court reasoned the Board provided no basis for concluding the IJ committed clear error and the IJ’s findings that the alien offered legitimate explanations for the fraudulent documents and inconsistencies were entitled to deferential review. *Id.* at 1246–48. The court also explained that the Board’s discussion of the alien’s confusing testimony indicated it impermissibly reweighed the evidence. *Id.* at 1246.

Eleventh Circuit

No cases.

Who are You? – Identity Issues in Immigration: Custody Proceedings

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Table of Contents

I. Flight Risk	3
A. Manner of Entry	3
B. Evidence of Second Identity in Separate Proceedings	3
C. Materially Changed Circumstances	4
II. National Security & Danger	4
A. Mass Migration of Unidentified Aliens	4
B. Deterrence of Mass Migration after <i>Matter of D-J</i>	5
C. Circumstances Where ID Issues Support a Nat'l Security/Danger Finding	6
III. Prolonged Detention	6
Habeas Cases Arising in the Second Circuit	6
Habeas Cases Arising in the Third Circuit	7
Habeas Cases Arising in the Fifth Circuit	8
Habeas Cases Arising in the Ninth Circuit	9
IV. Due Process in Detention	10

I. Flight Risk

A. Manner of Entry

Matter of Shaw, 17 I&N Dec. 177, 179 & n.3 (BIA 1979) (pertaining to bond proceedings conducted pursuant to former section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252 (1976)).

During the bond hearing and on appeal, the alien failed to come forward with evidence as to the length of his residence in the United States, his employment history, the location of his residence(s) in this country, how long he lived here, or with whom he lived. Other than an indication that he had a lawful permanent resident uncle in this country, there was no evidence at all of community ties of any nature which would suggest his continuing availability for future immigration proceedings.

The Board stated that the manner of an alien's entry is relevant in a bond determination inquiry, noting that "a greater bond will ordinarily be warranted in the case of an alien who entered the United States unlawfully (through evasion of immigration authorities or use of a false identity) than in the case of an alien, otherwise similarly situated, who has entered this country lawfully using a true identity." In light of the complete lack of information regarding the alien's community ties, and the fact that it was unknown how or when he entered the United States, the Board concluded that the significant bond imposed by the Immigration Judge was warranted.

Unpublished

Matter of Ejoga, 2008 WL 3861948, at *1 (BIA July 14, 2008) (per curiam) (affirming the Immigration Judge's denial of bond because, among other things, the alien "failed to establish his identity. The record indicates that he used . . . another's visa to enter the United States and attempted to use that same false identity to obtain U.S. citizenship").

Matter of Watson, 2007 WL 1153542, at *2 (BIA Apr. 10, 2007) (upholding an Immigration Judge's flight risk determination because, among other things, "there are issues surrounding his true identity as well as the date and manner of his entry into the United States").

Matter of Rasheed, 2006 WL 901565, at *1-2 (BIA Mar. 9, 2006) (per curiam).

The Immigration Judge granted the alien's request for a change in custody status and ordered him released on bond. On appeal, the Department of Homeland Security ("DHS") argued that the alien is a flight risk because his true identity remained unknown, he claimed three distinct identities, and he admitted to the DHS that he had assumed the identity of another person. The alien argues that his identity was clearly established. The Board found that the alien did commit fraud at entry and had used several names. Thus, the Board concluded that the alien was a significant flight risk, sustained the DHS's appeal, and ordered him to be held without bond.

B. Evidence of Second Identity in Separate Proceedings

Unpublished

Matter of Sakellarion, 2006 WL 2183404, at *1 (BIA June 19, 2006).

The alien claimed to be a United States citizen and there was a question as to whether the alien was subject to the custody provisions of the Act. The alien presented a birth certificate in the name he provided in the current proceedings to support his citizenship claim. However, the Immigration Judge noted that the alien was previously in proceedings under a different name. Based on this record, the Board found that “there is sufficient question regarding his identity and citizenship to subject him to the custody provisions” of the Act.

Matter of Larousse, 2005 WL 3709390, at *1 (BIA Dec. 22, 2005) (per curiam).

The alien asserted that he was an individual who arrived in the United States in 1991, and was paroled into this country later that same year. However, the Immigration Judge found that the alien’s fingerprints did not correspond to the fingerprints of the individual the alien claimed to be. Furthermore, the DHS presented credible evidence at the alien’s bond hearing that the alien appeared at an interview with an immigration officer on August 4, 2005, and identified himself, under oath, as another individual. The Board agreed with the Immigration Judge that the alien did not establish his identity and affirmed the Immigration Judge’s conclusion that the alien is a substantial risk of flight such that no amount of bond would be sufficient to ensure his presence at future proceedings.

C. Materially Changed Circumstances

Yassir v. Ashcroft, 111 F. App’x 75, 76-78 (3d Cir. 2004).

The former Immigration and Naturalization Service (“INS”) repeatedly and consistently argued that the alien was a flight risk, and thus his continued detention was justified, because his identity and citizenship remained uncertain. No other reason was proffered. The District Court for the District of New Jersey denied alien’s petition for a writ of habeas corpus, concluding that “[u]ntil and unless [alien’s] identity is confirmed, it is reasonable for the INS to continue his detention[.]” At oral argument before the United States Court of Appeals for the Third Circuit, the government conceded that the alien’s identity was no longer in doubt. This concession was based on a letter from the Palestinian Liberation Organization Mission, confirming the alien’s date and place of birth. The evidence of the alien’s identity meant that the sole stated basis for the alien’s continued detention no longer exists. The court remanded to the District Court to review whether these changed circumstances weighed in favor of the alien’s release.

II. National Security & Danger

A. Mass Migration of Unidentified Aliens

Matter of D-J-, 23 I&N Dec. 572, 572-85 (A.G. 2003).

The alien, from Haiti, was taken into custody and detained while attempting to evade inspection. The alien arrived aboard a vessel carrying over 200 undocumented aliens from Haiti and the Dominican Republic. He and other passengers on the vessel were apprehended ashore after the vessel sought to evade interdiction. The Immigration Judge ordered the alien released on bond over the objections of the INS, which argued that the release of the alien, and of other members of the undocumented migrant group, would stimulate further surges of such illegal migration and threaten important national security interests. The INS appealed, and the Board dismissed the appeal, concluding that the broad national security interests invoked by the INS were not an appropriate consideration in bond proceedings.

Concluding otherwise, the Attorney General vacated the Board's decision and ordered that the alien be detained pending the completion of his immigration proceedings. In support of this determination, the Attorney General found that granting bond to the alien may encourage additional surges of migration. The Attorney General also cited evidence from the United States Coast Guard, asserting that "because maritime migrants are typically undocumented and carry little or no identification, it is often difficult to ascertain the identity and background of interdicted persons, particularly in large groups, which presents potential threats to officer safety, as well as national security." The Attorney General additionally cited a State Department report reflecting that migrants from Pakistan were using Haiti as a staging ground to enter the United States. Based on this record, the Attorney General concluded that "the release on bond of undocumented seagoing migrant aliens from Haiti without adequate background screening or investigation presents a risk to national security that provides additional grounds for denying [the alien's] release on bond." He further noted that the United States government lacked the resources to "undertake an exhaustive factual investigation concerning the individual status of hundreds of undocumented aliens," creating a "substantial risk that granting release on bond to such large groups of undocumented aliens may include persons who present a threat to the national security, as well as a substantial risk of disappearance into the alien community within the United States."

B. Deterrence of Mass Migration after *Matter of D-J-*

RILR v. Johnson, 80 F. Supp. 3d 164, 170-75, 189 (D.D.C. 2015).

The plaintiffs, mothers and their minor children from Honduras, Guatemala, and El Salvador who entered the United States during the so-called migrant "surge" in the summer of 2014, were apprehended, detained, and placed into expedited removal proceedings. Prior to their removal, the plaintiffs were determined to have a "credible fear" of persecution and were placed into removal proceedings. However, instead of being released, the DHS chose to detain each family pending the completion of proceedings. The plaintiffs filed a class action law suit in the United States District Court for the District of Columbia, alleging that their detention resulted from an unlawful policy that the DHS had adopted in June 2014 in response to the surge. Pursuant to that policy, plaintiffs claimed that the DHS is detaining Central American mothers and children with the aim of deterring potential future mass migration, which the plaintiffs claimed violated the Fifth Amendment to the United States Constitution, the Act, and applicable regulations, among other things. The plaintiffs moved to preliminarily enjoin the DHS from applying this policy until a final determination was reached on the merits of their action. The DHS countered that its policy stemmed from *Matter of D-J-*, 23 I&N Dec. 572 (A.G. 2003), binding precedent which required the DHS to consider deterrence of mass migration in making custody determinations under section 236(a) of the Act, 8 U.S.C. § 1226(a).

The court granted the plaintiffs' preliminary injunction, thereby prohibiting the DHS from detaining class members for the purpose of deterring future mass migration to the United States and from considering deterrence of such migration as a factor in the DHS's initial custody determinations. The court based its preliminary injunction on its conclusion that plaintiffs were likely to prevail on their claim that section 236(a) of the Act—when construed to avoid due process concerns—does not permit detention based on "generalized deterrence." Furthermore, the court held that, even assuming that general deterrence could justify such detention under certain circumstances, the DHS had failed to justify detention based on such interests here—notwithstanding the fact that the government had couched its interest in terms of "national security." While acknowledging that the surge strained the DHS's resources, the court found the DHS's contention that the surge itself posed a threat to national security to be lacking, opining that "[t]he simple fact that increased immigration takes up government

resources cannot necessarily make its deterrence a matter of national security, with all the attendant deference such characterization entails.”

Pursuant to the injunction: (1) the DHS must make custody decisions based on individualized flight risk and danger, not based on considerations of generalized deterrence; (2) the DHS cannot ask Immigration Judges reviewing the initial custody determinations to order continued detention or set a high bond based on deterrence of future mass migration; and (3) the DHS should provide new custody determinations to all class members who remain detained after being previously denied release or who had a high bond set based, even in part, on deterrence grounds, *Matter of D-J-*, or concerns about contributing to mass migration.

POSTSCRIPT: In May 2015, the DHS issued a policy announcing that it would not consider general deterrence in its detention decisions for families. In light of the new policy, the parties in *RILR v. Johnson* agreed to dissolve the preliminary injunction and administratively close the case. However, the case has not been dismissed. Instead, under the court’s order, the government must first inform plaintiffs if and when it wishes to abandon its policy and resume its practice of detaining families on deterrence grounds. The plaintiffs can then return to the court and ask that the injunction be reinstated to prevent the government’s plans from going into effect.

C. Circumstances Where ID Issues Support a Nat’l Security/Danger Finding

Matter of Fatahi, 26 I&N Dec. 791, 792-94 (BIA 2016).

The alien had entered the United States using a fraudulent “stolen blank” Syrian passport, meaning that the passport book was issued legitimately by the Syrian government, but the alien’s identity information was entered without the government’s approval by an unauthorized person. Based on documents from Interpol and the Embassy of Greece, the Immigration Judge found that the alien’s passport was within a series of blank passports that had been stolen from the Syrian Government by operatives of the Islamic State in Iraq and Syria, a terrorist organization. Finally, the Immigration Judge relied on the evidence proffered by the alien during his bond hearing and the Record of Deportable/Inadmissible Alien (Form I-213) to find that the alien knew his passport was obtained through unofficial channels and that he made misrepresentations to DHS agents when questioned about his passport. Accordingly, the Immigration Judge determined that the alien should be held without bond under section 236(a) of the Act because he is a danger to the community and a flight risk. The Board affirmed this determination, concluding that the circumstances surrounding the alien’s use of the passport gave the Immigration Judge ample reason to deny his request for bond. The passport is a falsified document that the alien knowingly obtained. The fact that it was not issued by a proper governmental entity raised questions as to his identity. His explanations for how he obtained the passport were also inconsistent, and, even if these circumstances were deemed insufficient to deny bond, there is the added dimension of the document passing through the hands of a terrorist organization, which raises the question whether the alien posed a national security risk.

III. Prolonged Detention

Habeas Cases Arising in the Second Circuit

Bruce v. Slattery, 781 F. Supp. 963, 968-69 (S.D.N.Y. 1991).

The court held that the INS properly found that the alien’s continued detention was justified. The INS has been unable to determine the alien’s true identity or nationality. Citing precedent from the

Second Circuit, the court noted that an alien's identity is relevant to the likelihood of his risk of absconding. *See Bertrand v. Sava*, 684 F.2d 204, 217 n. 16 (2d Cir. 1982) (stating that "the existence of valid travel documents permits the INS to determine an alien's identity and it is much more difficult for an accurately identified alien to abscond while paroled.").

Unpublished

Thevarajah v. McElroy, No. 01-CV-3009, 2002 WL 923914, at *5 (E.D.N.Y. Apr. 30, 2002) (concluding that an alien was a flight risk because his identity had not been established with sufficient certainty).

Kwame v. INS, No. 98 CIV. 1786 (JGK), 1999 WL 253615, at *4 (S.D.N.Y. Apr. 28, 1999).

Alien provided multiple conflicting stories regarding his identity, including conflicting narratives regarding his parentage and his country of nationality, claiming that he was a national of South Africa and Ghana. He was ordered deported to South Africa and Ghana, in the alternative. He was detained pending the effectuation of his removal. The INS made multiple attempts to elicit information from the alien regarding his identity. The INS's and alien's multiple attempts to obtain travel documents from the Ghanaian and South African consulates were unsuccessful. In fact, Ghanaian consular officials informed the INS that they did not believe that the alien was a citizen of their country. The alien requested release from detention, and the INS denied his request, finding that he posed a flight risk. The alien filed a petition for a writ of habeas corpus with the District Court for the Southern District of New York, which the court denied. The court found that the INS reasonably determined that the alien had not met his burden of proof pursuant to the former governing regulation that he did not present a risk of flight and that a bond would therefore be required to ensure his appearance at future deportation proceedings. *See* 8 C.F.R. § 241.4(a) (1999) (providing that an alien must "demonstrate by clear and convincing evidence that [his or her] release would not pose a danger to the community or a significant flight risk" in order to be eligible for release pending removal). The INS properly relied on the fact that the alien is subject to a final order of deportation and that the INS was unable to establish the alien's country of origin or identity. Under these circumstances, the court concluded that the INS's determination that the alien posed a risk of flight was reasonable.

Abdul v. McElroy, No. 98 CIV. 2460 (JGK), 1999 WL 58678, at *5 (S.D.N.Y. Feb. 4, 1999).

The alien changed his story about his visa status and his identity multiple times since first being placed into INS custody. He was detained beyond the 90-day removal period, and his request for release was denied finding that he posed a significant risk of flight. The alien petitioned for a writ of habeas corpus with the District Court for Southern District of New York. The court concluded that the INS reasonably determined that the alien failed to make the required showing by clear and convincing evidence that he did not present a risk of flight under former 8 C.F.R. § 241.4(a). The court found that the alien posed a significant risk of flight because he is an illegal alien who has no documentation confirming his identity and who is under a final order of removal.

Habeas Cases Arising in the Third Circuit

Unpublished

Diaz-Martin v. Holder, No. CIV.A. 11-6692 PGS, 2012 WL 4661479, at *4-5 (D.N.J. Oct. 2, 2012).

The alien had not cooperated with the DHS in obtaining travel documents. The court therefore found his continued detention to be lawful. The alien provided identity information to the Salvadoran consulate that did not match their files, and which prevented Salvadoran officials from being able to verify his identity and issue travel documents. Based on these circumstances, the court concluded that the alien had not established that there was no likelihood of his removal in the reasonably foreseeable future.

Diallo v. Holder, No. CIV.A. 10-4656 JAP, 2011 WL 3037667, at *4 (D.N.J. July 25, 2011).

The court held that where the alien: (1) admitted that he has asserted two different identities and has bought fraudulent identification documentation; (2) admitted that he has four living relatives in New York who might be able to assist in providing identifying information; and (3) admitted that he has two living parents in Guinea who might be able to assist in providing identifying information, he has failed to cooperate in his removal and has thus failed to establish that there is no likelihood of his removal in the reasonably foreseeable future.

Habeas Cases Arising in the Fifth Circuit

Unpublished

Hook v. Holder, No. 2:11-CV-00131, 2014 WL 4929301, at *8 (W.D. La. Sept. 29, 2014), *aff'd sub nom. Hook v. Lynch*, 639 F. App'x 229 (5th Cir. 2016).

The alien was apprehended by DHS officials at a bus terminal. The only identification that he could provide was a purported United Kingdom driver's license which he was carrying with him at the time of his arrest. He claimed that he could not obtain his passport or other documents because all of his identification, and the means of accessing it, was in his luggage that had been seized by the DHS. Further complicating removal efforts, the alien repeatedly refused to answer questions about himself and claimed he could not remember details due to "medical reasons." The DHS eventually requested the assistance of Interpol in order to determine the alien's identity and nationality but Interpol was unable to do so. In addition, the British Consulate withdrew the alien's passport application due to his inability to prove his identity. The DHS informed the alien that his detention was being extended due to his failure to make timely and good faith efforts to obtain travel or other documents necessary for his removal.

The alien filed a petition for a writ of habeas corpus to challenge his continued detention, but the District Court for the District of Louisiana denied the petition, stating that "[w]hile it is regrettable that [the alien] remains detained in a federal facility, his detention is a result of his own failure to cooperate with [the DHS] and to provide information about his identity." The alien filed a second petition for a writ of habeas corpus with the District Court, but he offered no new proof regarding his identity. The District Court denied the second petition, holding that the alien had failed to make a good faith attempt to secure travel documents or otherwise cooperate with efforts to remove him. Therefore, under section 241(a)(1)(C) of the Act, 8 U.S.C. § 1231(a)(6), alien's continued detention is warranted until he begins to cooperate and reveals his true identity. Until such time as he cooperates, the court concluded, "he can assert no constitutional challenge to his detention, because his prolonged detention is the result of his own failure to cooperate."

Quoting *Fahim v. Ashcroft*, 227 F.Supp.2d 1359, 1366 (N.D. Ga. 2002), the court observed that, "[t]o the extent that the [alien] may hold, in part, the keys to his jail cell, he cannot complain, when he hides those keys, about his continued detention." Here, the court noted, if the alien would cooperate

by providing evidence of his identity, the DHS “could either begin the process of removing him from the country or release him from custody if necessary.” In other words, according to the court, the alien “holds the keys to his jail cell,” and it is up to him to use them.

Habeas Cases Arising in the Ninth Circuit

Lema v. INS, 341 F.3d 853, 854-57 & nn. 1, 3 (9th Cir. 2003).

The alien submitted conflicting documents to immigration officials that created confusion as to whether his nationality was Eritrean or Ethiopian, but the parties agreed he was an Ethiopian national. The Immigration Judge ordered the alien removed to Ethiopia due to his aggravated felony conviction, and he was held in the custody of the former INS for 2 years awaiting the issuance of Ethiopian travel documents.

While detained, the alien listed his nationality as “Eritrea[n]/Ethiopia[n]” on his passport application and informed the Ethiopian consular official that he was Eritrean, not Ethiopian. He refused to reapply for travel documents or corroborate his Ethiopian nationality. He filed a habeas corpus petition with the district court in which he challenged his continued detention, and the district court denied his petition.

The Ninth Circuit considered the alien’s claim in light of *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (construing section 241(a)(6) of the Act, 8 U.S.C. § 1231(a)(6), to limit an alien’s post-removal detention to “a period reasonably necessary to bring about that alien’s removal”), and *Pelich v. INS*, 329 F.3d 1057, 1060 (2003) (holding that section 241(a)(1)(C) of the Act authorized the former INS to continue to detain an alien whose removal was prevented by his non-cooperation in applying for travel documents). The court held “when an alien refuses to cooperate fully and honestly with officials to secure travel documents from a foreign government, the alien cannot meet his or her burden to show there is no significant likelihood of removal in the reasonably foreseeable future.” In affirming the denial of the habeas corpus petition, the court concluded the circumstances at hand authorized INS’s continued detention of the alien under section 241(a)(1)(C) of the Act.

Pelich v. INS, 329 F.3d 1057, 1058-60 (9th Cir. 2003).

The alien was born in Poland, lived there for more than 2 decades, and claimed to be a Polish national on his refugee application. He entered the United States as a refugee. When he submitted his application for lawful permanent resident status, he claimed to be a German national. He was detained by the INS. He told the INS that his father was from Israel and his mother was from Monaco and provided different names for his parents than those contained in his permanent resident application. The Immigration Judge ordered him deported to Poland or Germany. He waived his right to appeal.

INS sought to obtain travel documents for the alien from Poland, but he refused to complete the Polish passport application. He completed a German passport application using a different name and claiming to be of Polish nationality, and INS attached a letter stating he was both a Polish and German citizen. Germany denied the passport application. The alien remained in detention and petitioned for a writ of habeas corpus, which the district court denied.

The alien also argued that his ongoing detention violated *Zadvydas v. Davis*, 533 U.S. 678, 684–86 (2001). In affirming the denial of the habeas corpus petition, the Ninth Circuit distinguished the alien’s case from *Zadvydas*, in that the alien continued to refuse to complete a Polish passport

application and was being held under a different provision, section 241(a)(1)(C) of the Act. The court explained “Zadydas does not save an alien who fails to provide requested documentation to effectuate his removal.” The court held that “an alien cannot assert a viable constitutional claim when his indefinite detention is due to his failure to cooperate with the INS’s efforts to remove him.”

The alien also asserted INS did not have the authority to deport him to Poland because he was ineligible for Polish citizenship. The Ninth Circuit reasoned his status in Poland was within Poland’s authority to determine, and it was reasonable for INS to believe he was Polish. The court determined INS’s attempt to deport him there was consistent with the statutory framework governing the designation of countries of removal.

Unpublished

Ekeh v. Gonzales, 197 F. App’x 637, 638-39 (9th Cir. 2006).

The alien was detained for 30 months pending his removal and filed a habeas corpus petition. The record indicated he applied for travel documents from ten countries, submitted to interviews with officials from Liberia and Nigeria, and repeatedly pledged to sign documents that would secure his removal. In denying his petition, the district court concluded there was “no good reason to believe” the alien’s claim that he fully cooperated in obtaining travel documents. The Ninth Circuit disagreed, holding there was “good reason to believe” the alien would not be removed in the reasonably foreseeable future, granted his petition, and ordered his supervised release.

The dissent would have denied the habeas corpus petition, noting that the DHS found the alien had provided misleading information about his identity and did not provide sufficient information to Nigeria to establish his father’s citizenship, and thus was not cooperating with its efforts to remove him. The dissent also noted the Liberian Embassy officer indicated the alien obtained his Liberian passport illegally and was evasive during his interview. The dissent explained the alien had also provided inconsistent information about his family, and the record contained ample evidence the alien was not truthful: he had sustained a grand theft conviction involving a forged check; he had made a documented false claim to United States citizenship; and he sustained convictions for making false statements on a passport application and for participating in a scheme involving counterfeit currency, credit cards, and checks.

IV. Due Process in Detention

Singh v. Holder, 749 F.3d 622, 623-28 (7th Cir. 2014).

The alien claimed that he was named Tarsem Singh, he was born in June 1982, and he entered the United States illegally in May 1995. However, the documentary record indicated that the alien used two names: Tarsem Singh and Simranjit Singh. He also provided immigration authorities with three different birth certificates (two for Tarsem Singh and one for Simranjit Singh), containing birth dates that varied by as much as 4 years. The alien additionally presented passports for each identity with different birth dates. Finally, he claimed three dates of entry separated by as much as 3 years. According to the alien, he was smuggled into the United States in 1995 dressed as a young girl, bearing the passport of his smuggler’s daughter. Following his illegal entry into this country, the alien was detained by immigration authorities in 1997. He was later released to his employer and then went to live with his father. A Form I-213, which was completed during the alien’s 1997 detention, lists the alien’s date of birth as May 21, 1978, which would have made him 19 years old when he was detained. The alien was personally served with a copy of the notice to appear in

detention. However, the alien's employer did not execute an agreement to care for the alien's well-being and ensure his presence at all future proceedings. After he learned of his son's detention, the alien's father decided it was necessary to create a new identity for the alien. His mother, who was still living in India, procured and sent an Indian birth certificate and other documents in the name of Simranjit Singh with a date of birth of February 2, 1978, making him 19 years old at the time of his detention.

In 1997, the alien's employer was served with a notice of the alien's removal hearing. There is no indication that the alien or his father received this notice, and the alien was ordered removed in absentia. In 2010, the alien moved to reopen. Proceedings were reopened, and the Immigration Judge conducted two new hearings at which the alien moved to terminate proceedings, arguing that contrary to the Form I-213, he was 15 years old when he was detained in 1997. Thus, his detention violated 8 C.F.R. § 236.3, insofar as he was under 18 years old in 1997 and the INS did not release him into the custody of a parent, guardian, adult relative, or other adult who would ensure his presence at future proceedings.

The Immigration Judge held that the alien had received proper service of his removal proceedings because he had received personal service of the notice to appear when he was 19 years old. Thus, pursuant to the regulations, the alien's removal proceedings had been properly initiated. *See* 8 C.F.R. § 103.5a(c)(2)(ii) (providing that service is effective on an alien 14 years or older), *redesignated as* 8 C.F.R. § 103.8(c)(2)(ii). The Immigration Judge also found that the alien's detention and release was in accordance with the regulations. The Board affirmed the Immigration Judge's decision. On appeal, the alien again argued that his 1997 detention was invalid because he was a juvenile when he was detained, and the former INS failed to comply with 8 C.F.R. § 236.3.

The court rejected this argument. In light of the array of conflicting evidence presented regarding the multiple ages and identities claimed by the alien, the court held that he had not established he was under the age of 18 when he was detained in 1997, and thus he had not shown that he was privy to the release procedures outlined in 8 C.F.R. § 236.3. Thus, the court found no reason to disturb the Immigration Judge's decision.



WHO ARE YOU? IDENTITY ISSUES IN IMMIGRATION

Garry D. Malphrus

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Moderator

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Board of Immigration Appeals

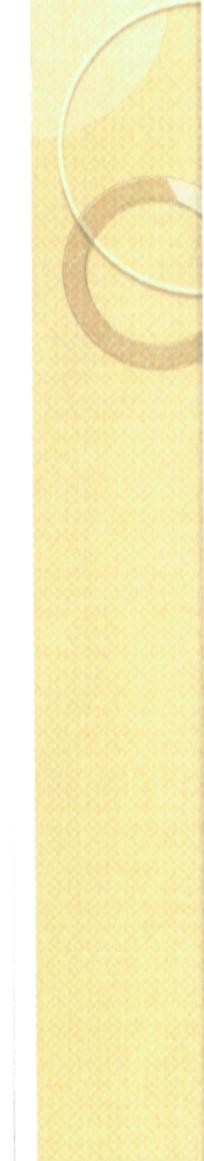
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Board of Immigration Appeals

Board of Immigration Appeals Training

September 21, 2016



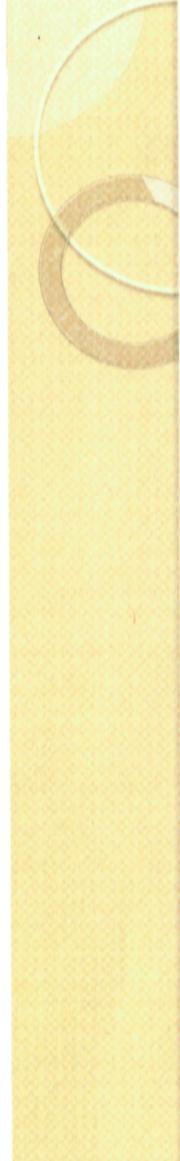
Identity Issues in Immigration

- What will not be covered:
 - Authentication of documents
 - Fraudulent documents/ Forensic Lab reports
 - U.S. national or citizenship claims
 - Gender identity issues
 - Identity theft
 - Motions to suppress



Identity Issues in Immigration

- What will be covered:
 - Determining & designating country(ies) of removal
 - Credibility
 - Corroborating evidence
 - Asylum eligibility
 - Custody/ detention issues



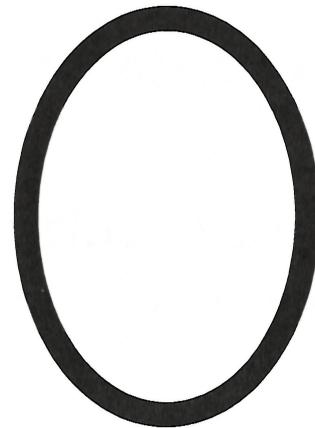
What is Identity?

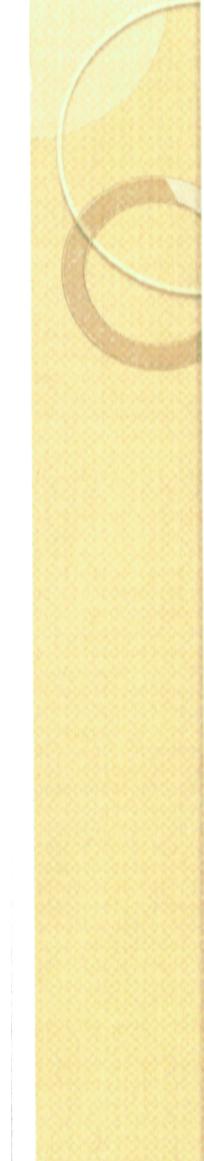
- Identity has been defined as:
 - “the distinguishing personality or attributes of an individual”
 - or “the authenticity of a person or thing.”
 - Black’s Law Dictionary (10th ed. 2014)
- The latter definition is the fifth definition & is preceded by “evidence” as a related subject.



Identity and the INA

- What does the INA say about identity?





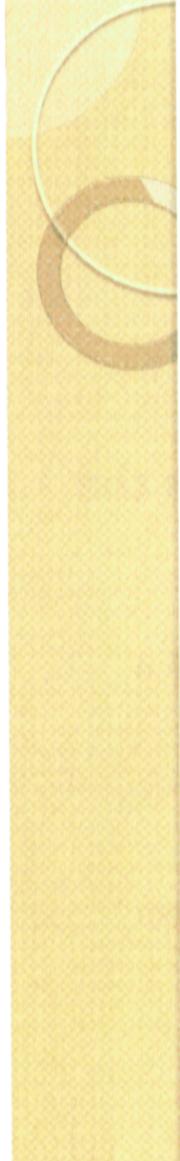
Identity, the INA & Regulations

- The INA has **no** provisions dealing specifically with identity.
- The INA focuses on alienage.
- Likewise, the regulations largely do not address identity
 - Regs, in relevant part, address identity in the context of background checks.



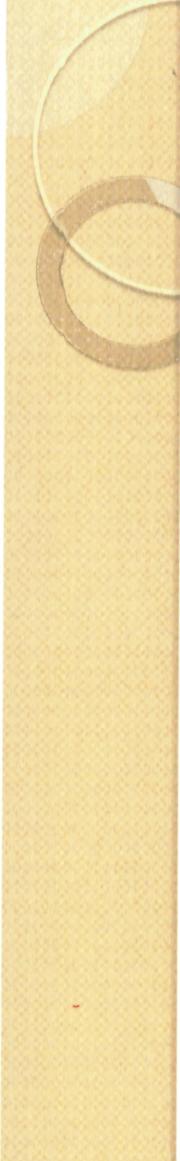
Alienage v. Identity

- Although the concepts of alienage and identity overlap, they are not synonymous.
- Where do these two concepts differ and why is the distinction important?
 - Alienage concerns where a person was not born or is a citizen – i.e. not a national or citizen of the U.S.
 - INA § 101(a)(3) (defining alien)
 - So issue then becomes what country(ies) is/are the alien from
 - Identity generally focuses on a person's name



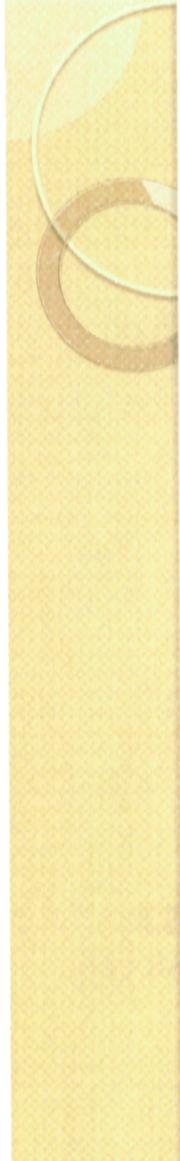
Alienage v. Identity, cont.

- An alien's identity is the name used in the charging document.
- Immigration Court jurisdiction, however, based on alienage, not identity.
- Alienage is based upon the nationality and citizenship of the alien as set forth in the charging document.



Alienage v. Identity, cont.

- The burden is on DHS to establish that the Immigration Court has jurisdiction by proving that the person in court is:
 - an alien; and
 - the person before the I.J. in the proceedings.
- See, e.g., *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923), overruled on other grounds by *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).



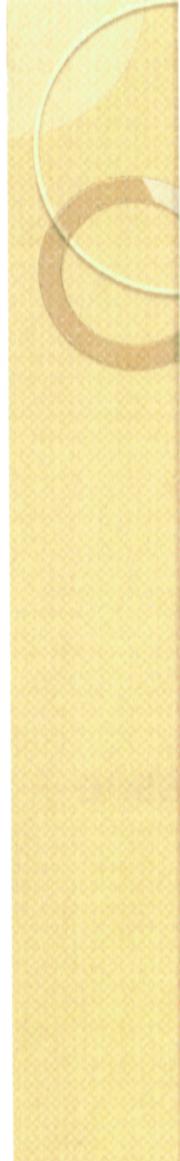
Alienage v. Identity, cont.

- The alien then has the burden to establish the time, place, and manner of his or her entry.
 - See section 291 of the INA, 8 U.S.C. § 1361.
- There is no legal authority for either party to establish the alien's identity at the outset of proceedings
 - However, the alien has the burden of establishing eligibility for relief from removal
 - This includes establishing identity where it is at issue



Alienage v. Identity, cont.

- Once alienage is established, an alien's identity may become relevant when:
 - Designating country(ies) of removal
 - Determining credibility where identity at issue
 - Establishing asylum eligibility



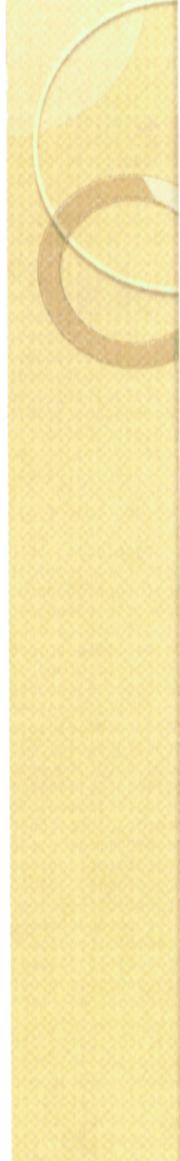
Designating a Country of Removal

- An alien is removed to the country(ies):
 - selected by the alien, subject to certain restrictions;
 - identified by the I.J.; and/or
 - for arriving aliens, the country(ies) from which the alien boarded the vessel or aircraft to come to the U.S., subject to certain exceptions
 - See INA § 241(b); 8 C.F.R. § 1240.10(f) (removal proceedings); 1240.49(c) (deportation proceedings)



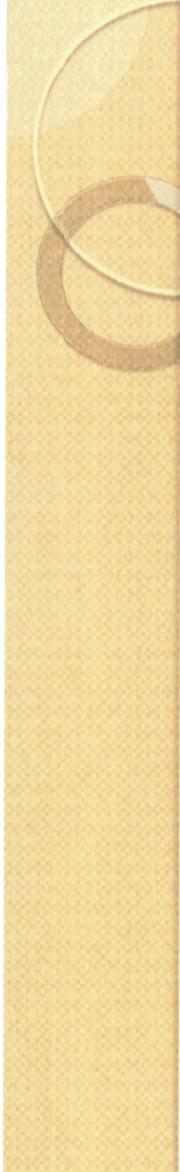
Country(ies) of Removal, cont.

- How does identity relate to the designation of a country of removal?
- To know who a person is, it is best to know where they are from
 - Identity documents are issued by country(ies) of nationality and/or citizenship



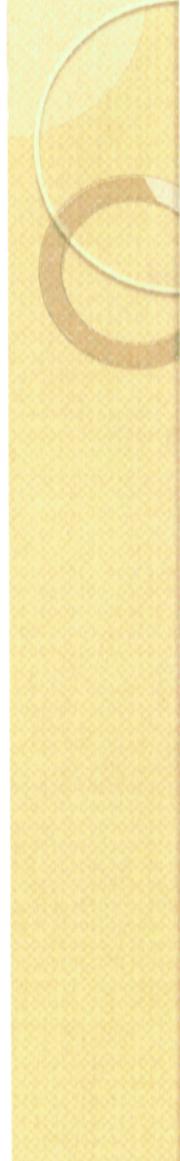
Country(ies) of Removal, cont.

- How does identity factor into designation of a country of removal?
 - Claim of statelessness
 - Born abroad to refugee parents
 - From a state or region undergoing civil conflict
 - From a state that has become an independent nation



Claim of Statelessness

- A claim of statelessness necessarily involves issues of identity & country of nationality or citizenship
- *Example 1:* Alien claims to be stateless Tibetan born in Nepal
 - Declines to designate a country of removal
 - DHS designates Nepal
- How do you determine alien's identity in order to designate a country of removal?
 - What evidence was presented?



Claim of Statelessness, cont.

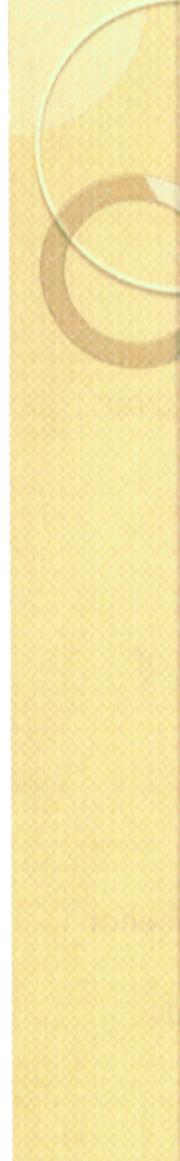
- Alien's evidence:
 - Green Book (Tibetan identity certificate)
 - School records
 - Letter from alien's parents, with envelope
 - Alien's testimony (sole witness)



Claim of Statelessness, cont.

- Alien's testimony:

- Parents left Tibet before alien born & had been in Nepal over 40 years
- Said had only single name of Urguyen
- Nepali school listed name as Urgen and added last name of Sherpa, which was last name of whole village
- Nepalese passport in name of Urgen Sherpa was fake
 - Obtained passport through broker with help from father & father's friends
 - Had no explanation for why passport in same name as school records



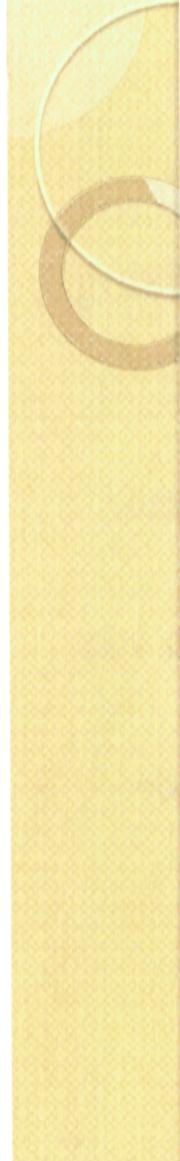
Claim of Statelessness, cont.

- DHS's evidence:
 - Alien's Nepalese passport and visa
 - Copy of DOS non-immigrant visa application detail pages
 - Forensic Lab report
 - Machine-readable visa conformed to comparable genuine specimens
 - Passport could not be conclusively authenticated



Claim of Statelessness, cont.

- The I.J. found alien's testimony not credible re being stateless Tibetan born in Nepal
 - Diminished weight given to Green Book & parents' letter
 - Implicitly greater weight given to Nepalese passport & visa
 - I.J. stated that I.J. did not know whether alien Tibetan or Nepalese
 - but ordered alien removed to Nepal



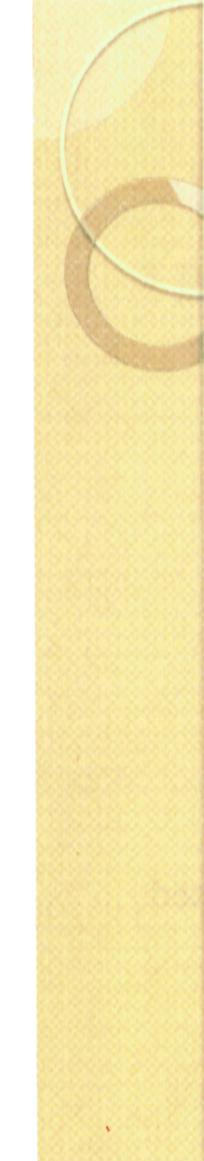
Claim of Statelessness, cont.

- The Board affirmed denial of asylum, withholding & CAT solely because doc. evidence did not establish that alien was Tibetan:
 - at best, the documentary evidence created a question about the alien's name, nationality, and citizenship, and
 - the alien failed to meet his burden of establishing his identity and nationality.



Claim of Statelessness, cont.

- *Outcome*: an alien's nationality or lack of nationality is a threshold issue.
- That issue need not be established through "non-testimonial" evidence
- Case remanded to Board for
 - Reconsideration of adverse credibility finding; and
 - Explicit determination re alien's country of nationality or citizenship so asylum claim re that country could be evaluated
 - *Urgen v. Holder*, 768 F.3d 269 (2d Cir. 2014)



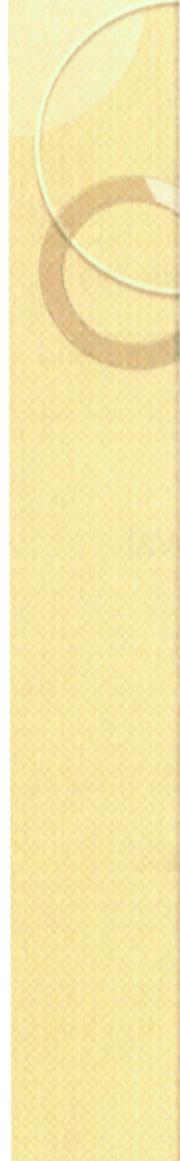
Claim of Statelessness, cont.

- *Example 2: Alien born in Italy to parents of Ethiopian ethnicity*
 - Granted LPR status in U.S.
 - Claimed to be stateless & declined to designate country of removal
 - I.J. found Ethiopia likely would not recognize alien as a citizen and alien may be stateless
 - I.J. ordered alien removed to Ethiopia & Board affirmed



Claim of Statelessness, cont.

- *Outcome:* Ninth Circuit found designation of Ethiopia to be error because I.J. did not find that alien was a subject, national, or citizen of Ethiopia
- Court stated that designation of country(ies) of removal must follow
 - Statutory framework in INA § 241(b)(2); and
 - Four-step inquiry set forth by S.Ct in *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335 (2005)
 - *Hadera v. Gonzales*, 494 F.3d 1154 (9th Cir. 2007)



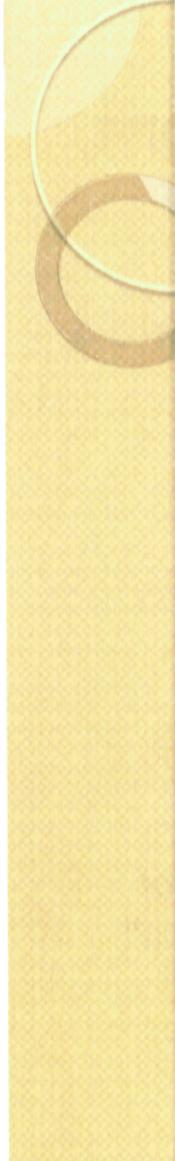
Born Abroad to Refugee Parents

- Aliens born abroad to refugee parents may also present identity issues
 - What is alien's country of nationality or citizenship?
 - Jui sanguinis – citizenship is that of parents, not where born
 - Jui soli – citizenship is that where born, often referred to a birthright citizenship
 - Firm resettlement



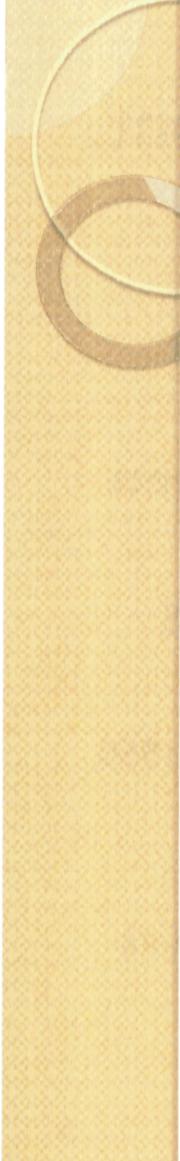
Born Abroad to Refugee Parents, cont.

- *Example 1:* Alien is Buddhist monk, born in India to Tibetan refugee parents
 - Applied for asylum, withholding & CAT re India
 - Documentary evidence provided:
 - Refugee registration certificate from India
 - Identity certificate from India allowing for travel outside of India & return if alien obtained a “No Objection to Return” stamp



Born Abroad to Refugee Parents, cont.

- The Immigration Judge
 - denied relief;
 - did not determine alien's country of nationality; and
 - designated India, or China in the alternative, as country of removal
- The Board affirmed



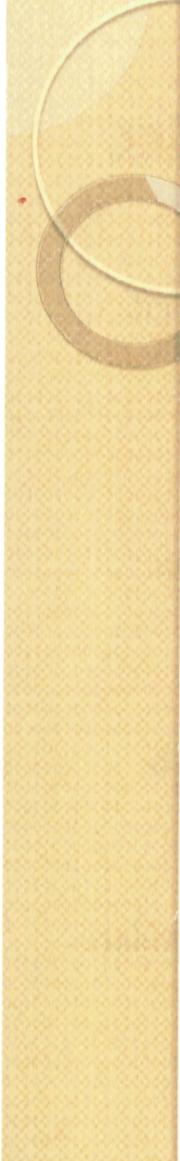
Born Abroad to Refugee Parents, cont.

- *Outcome:* it is an error to order an alien removed to an alternative country without first analyzing whether alien was eligible to be removed to that country under required statutory factors.
 - INA §§ 241(b)(1), (2); 8 C.F.R. § 1240.10(f) (removal proceedings)
 - Former INA § 243(a); 8 C.F.R. § 1240.49(c)(1) (deportation proceedings)
 - *Wangchuck v. Dep't of Homeland Sec.*, 448 F.3d 524 (2d Cir. 2006)



Born Abroad to Refugee Parents, cont.

- Administrative notice may be taken to resolve nationality issue
- *Example 2:* Alien born in India to Tibetan refugee parents
 - I.J. took admin notice of Indian Citizenship Act of 1955
 - Law provided citizenship to persons born in India between 1950 & 1987
 - I.J. found alien to be Indian national & designated India as country of removal



Born Abroad to Refugee Parents, cont.

- *Outcome:*
 - Court rejected alien's claim that even if eligible for Indian citizenship, alien did not claim it
 - Court stated that alien must show he was unable to return due to persecution rather than unwilling to accept citizenship
 - *Dorjee v. Att'y Gen. of the U.S.*, 538 F. App'x 171 (3d Cir. 2013)



State or Region Undergoing Civil Conflict

- **Example:** Alien claimed to be native and citizen of the Democratic Republic of Congo (DRC)
 - Evidence provided:
 - Zambian passport with alien's photograph but different name;
 - Alien's testimony that smugglers provided the passport;
 - DHS-Doc Lab report concluding that passport conformed to genuine document & did not contain conclusive evidence of alterations; and
 - DOS report indicating alien appeared in person at U.S. Consulate in Zambia to obtain visa



State or Region Undergoing Civil Conflict, cont.

- I.J. issued adverse credibility finding & denied relief and Board affirmed
- Alien filed MTReconsider
 - Claimed order of removal to DRC in the alternative was inconsistent with finding that he did not establish his nationality or citizenship
- Board denied motion



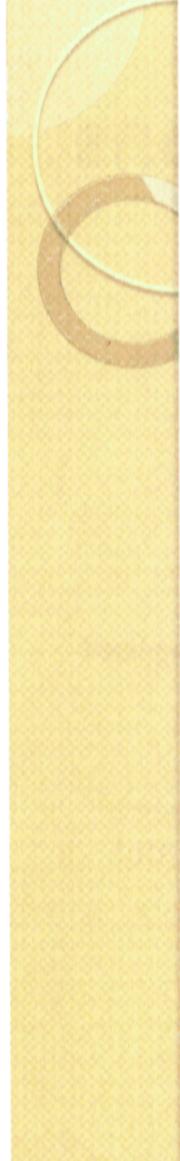
State or Region Undergoing Civil Conflict, cont.

- Court found
 - Record did not compel conclusion that alien was a native and citizen of the DRC
 - Alien's testimony that he resided in the DRC supported I.J.'s designation of DRC as alternate country of removal
 - *Mudiangomba v. Holder*, 372 F. App'x 161 (2d Cir. 2010)



States now Independent Nations

- Issues to consider:
 - What country does the alien claim for citizenship?
 - Where has alien resided or has family?
 - Does the U.S. recognize the newly created state?
 - See e.g., *Depa v. Holder*, 486 F.App'x 933 (2d Cir. 2012) (noting U.S. recognized Tibet to be a part of China)
 - See e.g., *Tesfamichael v. Gonzales*, 469 F.3d 109 (5th Cir. 2006) (rejecting alien's argument that her asylum claim should have been analyzed re Ethiopia because alien sought asylum from Eritrea and did not claim to be an Ethiopian national)
 - Distinguishing case from Seventh Circuit precedent discussing denationalization and deportation as a form of persecution



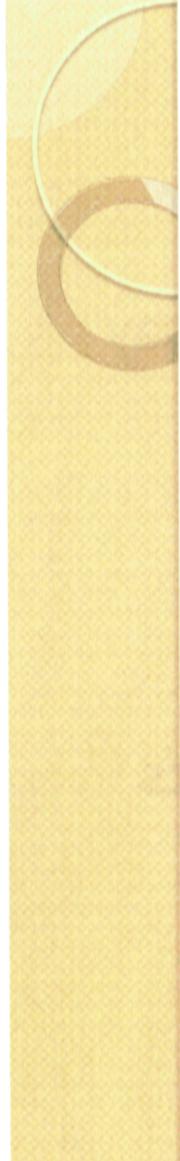
Credibility

- Identity or nationality/citizenship may be established through credible testimony alone.
 - *Niang v. Mukasey*, 511 F.3d 138 (2d Cir. 2007)
- Incredible testimony may be rehabilitated through corroborating evidence.
 - See generally, *Coulibaly v. Lynch*, ___ F.App'x ___, 2016 WL 3941047 (2d Cir. 2016) (upholding adverse credibility finding, including whether alien was from Cote d'Ivoire, where I.J. found alien's testimony not rehabilitated through corroborating evidence)



Adverse Credibility & Fraudulent Documents

- Submission of fraudulent documents may not necessarily support an adverse credibility determination
- Key issue is whether alien knew, or should have known, that the documents were false



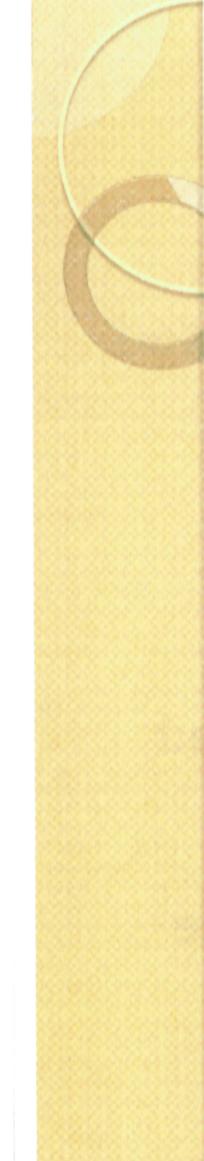
Adverse Credibility & Fraudulent Documents, cont.

- *Example 1:* Alien claimed to be native and citizen of Mauritania named Souleymane Niang
 - Entered U.S. on Senegalese passport and student visa in name of Mamadou Ba
 - Submitted Mauritanian identity card that father obtained before family expelled from Mauritania
 - Also submitted a Senegalese refugee identity card
 - Claimed this card left at refugee camp but obtained from refugee camp director and mailed to alien



Adverse Credibility & Fraudulent Documents, cont.

- I.J. rendered adverse credibility finding based on the documents
 - Found identity documents not genuine
 - Determined that alien's explanation for how Senegalese refugee identity document obtained to be "far-fetched"
 - Alien testified inaccurately about his age in the documents



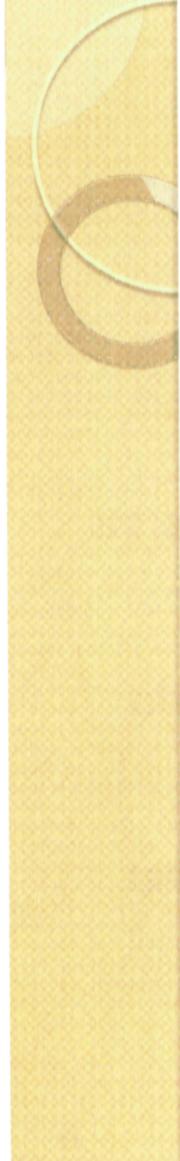
Adverse Credibility & Fraudulent Documents, cont.

- I.J. decision:
 - Mauritanian identity document appeared altered
 - Document indicated alien was a businessman or commercial figure
 - alien would have been 11 years old when document issued
 - I.J. stated that alien's demeanor & rest of testimony supported claim



Adverse Credibility & Fraudulent Documents, cont.

- *Outcome:* Adverse credibility finding not supportable
 - Court found problematic aspects of I.J.'s reasoning re fraudulent nature of documents
 - Since suspicions about documents tenuous, they do not support an adverse credibility finding
 - This particularly true where I.J. explicitly stated that the testimony did not sound made up
 - Niang v. Mukasey, 511 F.3d 138 (2d Cir. 2007)



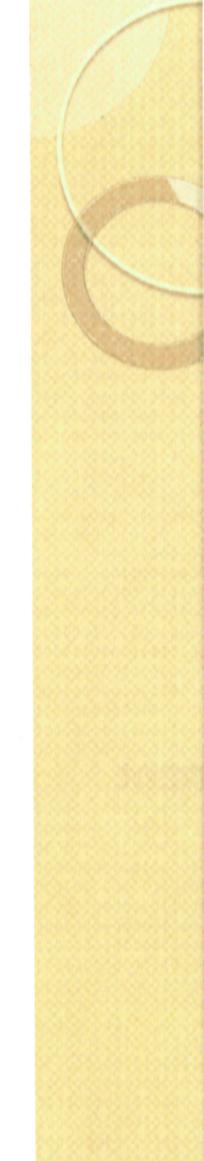
Adverse Credibility & Fraudulent Documents, cont.

- *Example 2: Alien was native of former U.S.S.R. and citizen of Ukraine*
 - Submitted birth certificate allegedly issued in Ukraine
 - INS assistant at U.S. Embassy in Moscow indicated that birth certificate was fraudulent
 - Alien submitted rebuttal evidence



Adverse Credibility & Fraudulent Documents, cont.

- I.J. issued adverse credibility finding based on
 - fraudulent documents;
 - contradictory facts between original asylum application & supplemental affidavit; and
 - Inconsistent testimony regarding a medical document submitted to corroborate claim
- Declined to credit rebuttal evidence because documents not authenticated



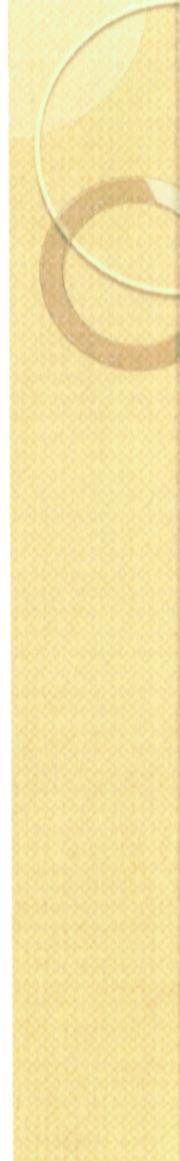
Adverse Credibility & Fraudulent Documents, cont.

- **Outcome:** Court found any of the 3 bases for adverse credibility finding supportable
 - Dissent disagreed
- Majority noted that rebuttal evidence could have been found
 - to be valid; and
 - to successfully rebut INS finding that birth certificate was fraudulent
 - But such conclusion not compelled by evidence
 - *Borovikova v. U.S. Dep't of Justice*, 435 F.3d 151 (2d Cir. 2006)



Adverse Credibility & Fraudulent Documents, cont.

- *Example 3: Alien claimed to have been persecuted because he was Jewish*
 - Provided Russian birth certificate listing nationality as Jewish
 - INS expert found document to be forgery
 - Alien said did not know document was forgery



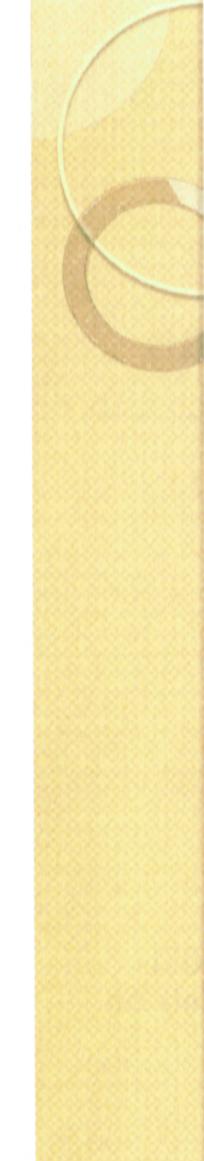
Adverse Credibility & Fraudulent Documents, cont.

- I.J. rejected alien's explanation & issued adverse credibility determination
- Board affirmed, finding fraudulent document undercut credibility
- *Outcome:* Court held adverse credibility finding not supportable
 - Alien not aware of forgery so document could not undermine credibility
 - *Kourski v. Ashcroft*, 355 f.3d 1038 (7th Cir. 2004)
 - See also, *Hanaj v. Gonzales*, 446 F.3d 694 (7th Cir. 2006)



Adverse Credibility & Fraudulent Documents, cont.

- An I.J. finding that document fraudulent can support an adverse credibility finding if I.J.
 - makes specific findings for discrediting documents, and
 - indicates judicial experience
 - See e.g., *Osongo v. Gonzales*, 457 F.3d 849 (8th Cir. 2006)
 - *Bropleh v. Gonzales*, 428 F.3d 772 (8th Cir. 2005)
 - *Dao Lu Ling v. Gonzales*, 434 F.3d 1158 (9th Cir. 2006)
 - *Compare, Jin Chen v. U.S. Dep't of Justice*, 426 F.3d 104 (2d Cir. 2005) (I.J. finding that birth certificates appeared fabricated based “solely on speculation and conjecture”)



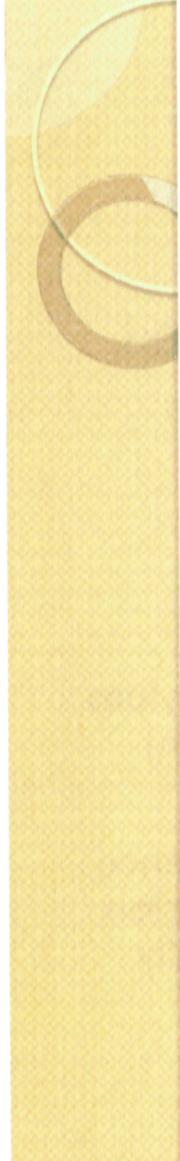
Adverse Credibility & Fraudulent Documents, cont.

- Fabricated or fraudulent documents can support an adverse credibility finding where:
 - reliable investigative report finds document false, or
 - I.J. makes specific findings for not crediting documents, coupled with statements regarding judicial experience; and
 - where alien given notice and opportunity to respond



Corroborating Evidence

- Where identity or nationality is questioned, existence or absence of corroborating evidence can be important
 - *Compare Ahmed v. Holder*, 765 F.3d 96 (1st Cir. 2014) (corroborating evidence properly considered where doubts existed re identity due to filing of Canadian asylum application under different name & with different claim)
 - *With Khan v. Mukasey*, 541 F.3d 55 (1st Cir. 2008) (absence of corroborating evidence of Canadian asylum application significant since Canada a friendly gov't & alien originally entered U.S. under a false name)



Corroborating Evidence

- Pre-REAL ID cases
 - Insufficient evidence re identity alone does not support denial of relief absent adverse credibility finding
 - *Shahinyan v. Holder*, 518 F.App'x 545 (9th Cir. 2013)
- REAL ID Act added corroboration provision to alien's burden of proof for relief or protection from removal
 - INA § 240(c)(4)(B)



Corroborating Evidence, cont.

- I.J.s should advise aliens of need for corroborating evidence
 - *Matter of L-A-C*, 26 I&N Dec. 516 (BIA 2015)
- In Ninth Circuit –
 - Alien must be given notice of specific evidence requested, and an opportunity to provide or explain why evidence cannot be presented
 - See e.g. *Ren v. Holder*, 648 F.3d 1079 (9th Cir 2011);
 - *Ai Jun Zhi v. Holder*, 751 F.3d 1088 (9th Cir. 2014)



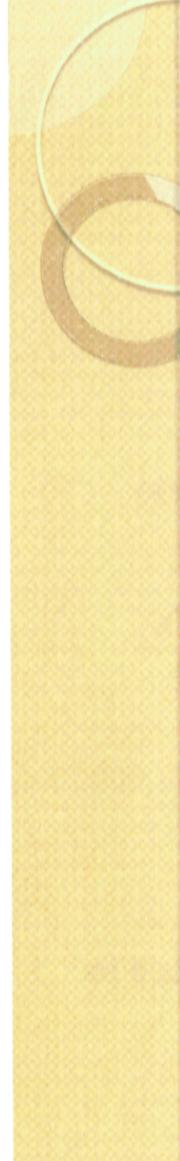
Burden of Proof & Corroborating Evidence

- *Example:*
- Nigerian alien sought asylum due to participation in Ijaw Youth Council
 - claimed to be son of prominent village chief
- I.J. rendered adverse credibility finding
 - Found alien did not submit sufficient corroborating evidence



Burden of Proof & Corroborating Evidence, cont.

- *Outcome:*
- *Adverse credibility finding upheld*
 - “far more damning than most cases” where I.J. did not believe documents pertained to alien
 - Although I.J. indicated that he expected DHS to rebut alien’s testimony re his identity (i.e. son of prominent village chief)
 - I.J. had also told alien to corroborate his identity
 - *Ibeagwa v. Mukasey*, 287 F.App’x 7 (9th Cir. 2008)
 - See also *Samake v. Holder*, 369 F.App’x 160 (2d Cir. 2010) (failure to establish identity alone sufficient to deny relief)



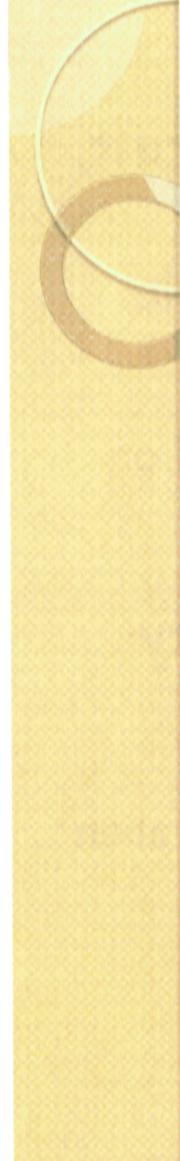
Absence of Corroborating Evidence

- Absence of non-documentary corroborating evidence may support adverse credibility finding
 - Example: Alien claimed to have obtained passport from Bangladeshi consulate in N.Y.:
 - Based solely on friend's statement regarding alien's identity alone;
 - Did not provide documentary evidence of identity; and
 - Did not file any paperwork



Absence of Corroborating Evidence, cont.

- I.J. found testimony re passport implausible
 - Rendered adverse credibility finding largely based on that implausibility
- *Outcome:* Court upheld adverse credibility finding
 - Noted that passport was open-ended although alien had pending criminal charges in Bangladesh.
 - *Alam-Begum v. Holder*, 486 F.App'x 929 (2d Cir. 2012)



Weight Given to Corroborating Evidence

- *Example:* Alien claimed to be native of Tibet and citizen of China
- Evidence in record:
 - Tibetan Green Book
 - Letters from N.Y. offices of Tibetan organizations
 - Uncertified copy of Chinese household registry
 - Letters from wife and friend asserting that Nepalese passport used to obtain U.S. visa was fraudulent
 - I-94 arrival/departure record



Weight Given to Corroborating Evidence, cont.

- I.J. gave greater weight to I-94 & U.S. visa
 - These listed alien's citizenship as Nepalese
- I.J. also found alien did not meet burden of establishing nationality



Weight Given to Corroborating Evidence, cont.

- **Outcome:** Court found:
 - weighing of evidence reasonable
 - alien failed to obtain numerous documents that were available
 - Evidence alien provided did not explain basis for author's conclusions re alien's ethnicity
 - Letters from U.S. organizations based on the Tibetan Green Book, which post-dated alien's arrival in U.S.
 - Letters from wife and sister were unsworn
 - *Phuntsok v. Holder*, 475 F.App'x 343 (2d Cir. 2012)
 - See also, *Ba v. Holder*, 402 F.App'x 611 (2d Cir. 2010)



Confidentiality & Corroborating Evidence

- Information in, or pertaining to, an alien's asylum application must be kept confidential.
 - 8 C.F.R. § 1208.6
 - See *Matter of R-K-K-*, 26 I&N Dec. 658 (BIA 2015)
 - See also, *Singh v. Holder*, 638 F.3d 1264 (9th Cir. 2011) (pre-REAL ID case)



Confidentiality & Corroborating Evidence, cont.

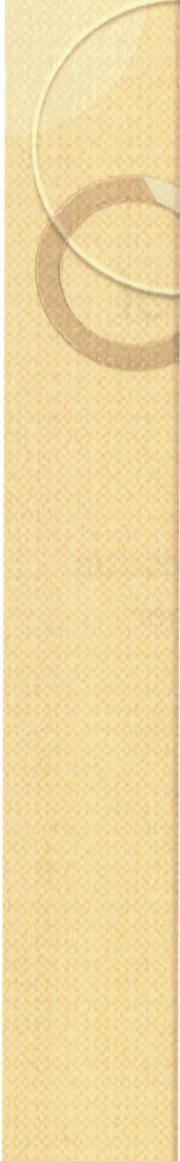
- Compare:

- Finding of Gov't violation:

- *Lin v. U.S. Dep't of Justice*, 459 F.3d 255 (2d Cir. 2006)
 - *Corovic v. Mukasey*, 519 F.3d 90 (2d Cir. 2008)
 - *Anim v. Mukasey*, 535 F.3d 243 (4th Cir. 2008)
 - *Abdel-Rahman v. Gonzales*, 493 F.3d 444 (4th Cir. 2007)
 - *Dayo v. Holder*, 687 F.3d 653 (5th Cir. 2012)
 - *Owino v. Holder*, 771 F.3d 527 (9th Cir. 2014)

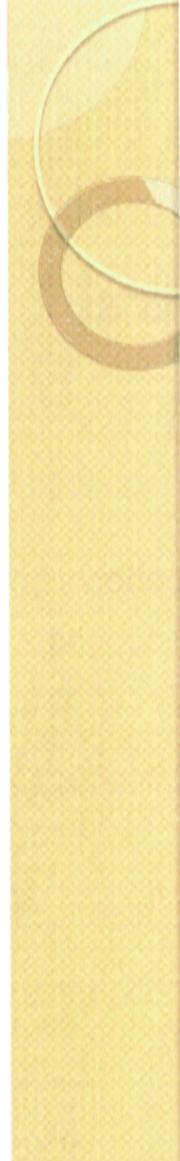
- With finding of no violation:

- *La v. Holder*, 701 F.3d 566 (8th Cir. 2012)
 - *Rafiyev v. Mukasey*, 536 F.3d 853 (8th Cir. 2008)
 - *Averianova v. Mukasey*, 509 F.3d 890 (8th Cir. 2007)
 - *Bondarenko v. Holder*, 733 F.3d 899 (9th Cir. 2013)
 - *Lyashchynska v. U.S. Att'y Gen.*, 676 F.3d 962 (11th Cir. 2012)



Asylum Eligibility

- An asylum applicant's nationality is central to eligibility
 - INA § 101(a)(42)(A) (definition of refugee);
 - INA § 208(a)(1)(B)(i) (burden of proof on alien to establish alien is a refugee as defined above);
 - 8 C.F.R. § 1208.13.
- Failure to determine nationality is an error
 - *Wangchuck v. Dep't of Homeland Sec.*, 448 F.3d 524 (2d Cir. 2006)



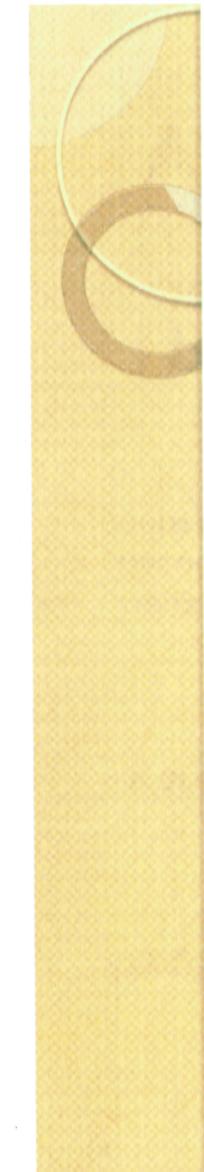
Asylum Eligibility, cont.

- Inconsistencies re identity go to heart of asylum claim
 - *Ndah v. Holder*, 512 F.App'x 557 (6th Cir. 2013) (noting that inconsistencies re alien's birth date, marital status, and profession not relevant to asylum claim but called into question whether the alien was the person he claimed to be)
 - *Demirchian v. Holder*, 552 F.App'x 780 (9th Cir. 2014)
 - *(Harvinder) Kaur v. Mukasey*, 304 F.App'x 602 (9th Cir. 2008)
 - *(Rashpal) Singh v. Gonzales*, 187 F.App'x 751 (9th Cir. 2006)
 - *Bihi v. Gonzales*, 121 F.App'x 773 (9th Cir. 2005)



Asylum v. Withholding under INA

- Eligibility for withholding of removal under the INA operates only as to the proposed country of removal
 - See e.g., *Dhargyal v. Lynch*, 632 F.App'x 39 (2d Cir. 2016) (Board must consider eligibility for withholding and CAT re China, the proposed country of removal, if on remand Board affirms I.J. finding that alien is of Tibetan ethnicity where alien's nationality and citizenship unknown)
 - INA § 241(b)(3) (alien cannot be removed to a country where it is more likely than not that alien would be persecuted OAO protected ground)
 - 8 C.F.R. § 1208.16(b) (burden of proof on alien to establish eligibility for withholding under the INA)



Asylum v. Convention Against Torture

- Eligibility for withholding of removal or deferral of removal under the Convention Against Torture (CAT) operates only as to the proposed country of removal
 - 8 C.F.R. §§ 1208.16(c), 1208.17(a) (eligibility for withholding or deferral of removal under CAT)



Asylum Eligibility & Motions to Reopen

- Denial of motion to reopen based on changed country conditions upheld where:
 - I.J. found alien did not establish identity as native of DRC & thus could not establish *prima facie* eligibility for asylum
 - Board denied motion, which had identity documents attached because not previously unavailable
 - Alien did not rebut I.J.'s dispositive identity determination with admittedly not new evidence where alien claimed prior atty did not ask for identity documents but did not indicate that IAC claim would be pursued.
 - *Mudiangomba v. Holder*, 401 F. App'x 600 (2d Cir. 2010)



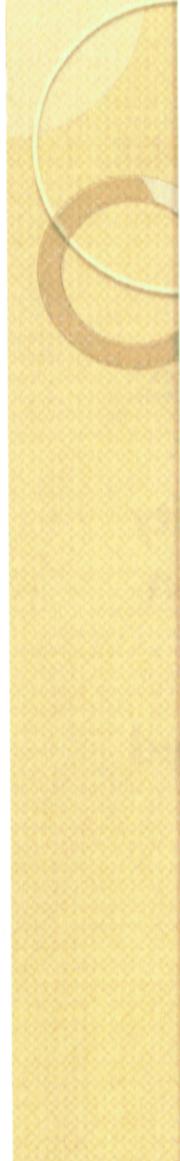
Asylum Eligibility & Motions to Reopen, cont.

- Denial of motion to reopen based on changed country conditions upheld where:
 - Board found alien did not establish either Guinean identity or nationality so could not establish that country conditions had changed
 - Evidence with motion properly not credited where alien found not credible in underlying proceedings, had applied for asylum under false name, provided untrue testimony, and submitted false documents
 - *Dia v. Holder*, 459 F. App'x 50 (2d Cir. 2012)
 - See also, *Mbaye v. Holder*, 369 F. App'x 668 (6th Cir. 2010) (denying PFR where Board denied MTR because alien did not rebut adverse credibility finding or address I.J. finding that alien did not establish his Mauritanian identity).



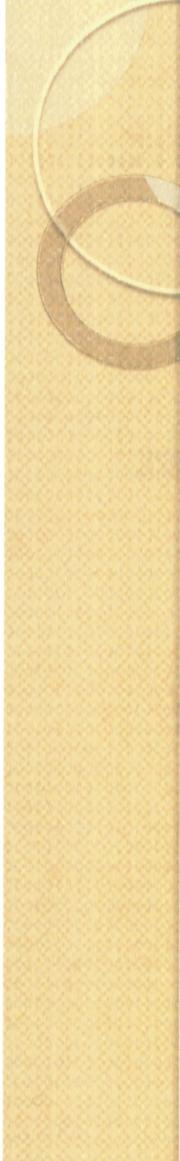
Asylum Eligibility & Motions to Reopen, cont.

- Denial of motion to reopen based on changed country conditions upheld where:
 - Court had previously upheld adverse credibility finding, which alien did not challenge in motion
 - Court found adverse credibility finding involved key element of asylum claim, such as alien's identity
 - *De Vos v. Holder*, 599 F. App'x 705 (9th Cir. 2015)



Summary – Take Away Points

- An alien's identity and/or country of nationality or citizenship is a threshold issue
- It may be determined by credible testimony alone
 - Documentary or corroborating evidence not necessarily required
- If corroborating evidence of identity or nationality/citizenship was requested at hearing
 - the I.J. must state reason why alien's identity or nationality questioned or at issue



Summary – Take Away Points, cont.

- Determination of an alien's nationality or citizenship is central to asylum eligibility
 - This may be dispositive of the asylum eligibility issue
 - but not for eligibility for withholding under the INA or for protection under CAT
- Designation of country(ies) of removal should follow statutory and regulatory requirements



Summary – Take Away Points, cont.

- Did the I.J.:
 - Discuss what caused alien's identity to be at issue;
 - Set forth & analyze what evidence was presented regarding identity or country of nationality/ citizenship;
 - State what weight is being given to the evidence provided



Summary – Take Away Points, cont.

- Did the I.J.:
 - State what corroborating evidence was required, if any & explain why needed
 - Give alien notice & opportunity to provide specific corroborating evidence where required by controlling precedent
 - See e.g. *Ren v. Holder*, 648 F.3d 1079 (9th Cir 2011); *Ai Jun Zhi v. Holder*, 751 F.3d 1088 (9th Cir. 2014)
 - See also *Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015)
 - Render an explicit credibility finding



IDENTITY ISSUES IN CUSTODY PROCEEDINGS



Establishing Identity in Custody Proceedings

- Flight Risk
 - Prolonged Detention
- National Security & Danger
- Due Process

Identity & Flight Risk



Uncertainty as to Alien's Identity

No Flight Risk

Flight risk but amenable to bond

No bond due to Flight Risk



Matter of Guerra, 24 I&N Dec. 37 (BIA 2006)

- Length of residence in U.S.
- Family ties in U.S.
- Employment history
- Record of appearance in court
- Attempts to flee authorities
- History of immigration violations
- Manner of entry to U.S.



Matter of Shaw, 17 I&N Dec. 177 (BIA 1979)

Manner of entry significant:

- Use of false ID at POE will necessitate higher bond than would be appropriate for individual for whom there is record of entry under true ID

Subsequent unpublished decisions

- False ID at POE + ID remains unclear = NO Bond



Bertrand v. Sava, 684 F.2d 204 (2d Cir. 1982)

Once an alien is accurately ID'd:

- It is much more difficult for such an alien to abscond
- More likely that accurately ID'd aliens will be eligible for relief



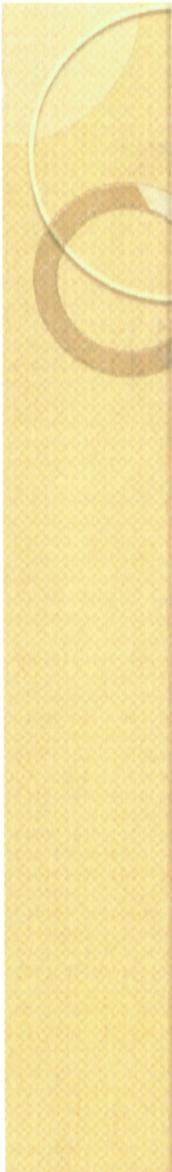
Identity Issues in Prolonged Detention

Effect of lack of ID on flight risk:



Prolonged Detention Cases w/ ID issues:

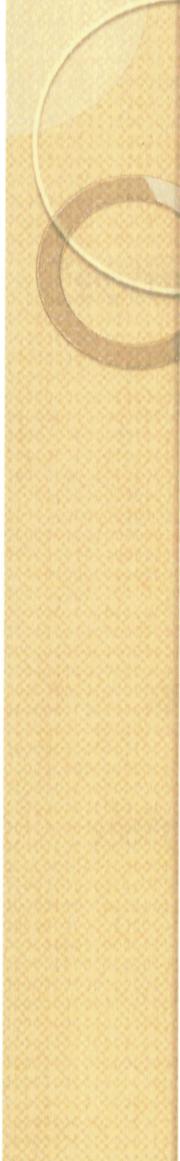
- Pre-Zadvydas *v. Davis*, 533 U.S. 678 (2001)
 - 8 C.F.R. § 241.4(a) (1999)
- Post-Zadvydas *v. Davis*
 - Section 241(a)(1)(C)



Pre-Zadvydas

8 C.F.R. § 241.4(a) (1999)

- Detained 90-day removal period
- Alien BOP: clear & convincing NOT flight risk
- Uncertainty re ID, may lead to cont'd detention
- Contrary to 1st, 2d, and 9th Circuits:
 - BOP on DHS to justify cont'd detention



Post-Zadvydas

Where alien provides inconsistent or no evidence re his or her ID, he or she may be unable to meet BOP under *Zadvydas*

- Section 241(a)(1)(C)
 - Provides for cont'd detention of aliens detained past 90-day period when they resist efforts to remove them or obtain travel docs



Unresolved Issues

- 1st, 2d, 9th Circuits: canon of “constitutional avoidance”
 - Same canon employed in *Zadvydas*
- In these circuits, unclear whether:
 - Where R w/holds ID, there is viable constitutional challenge to prolonged detention

See *Pelich v. INS*, 329 F.3d 1057 (9th Cir. 2003); *Hook v. Lynch*, 639 F. App'x 229 (5th Cir. 2016)

- ID issues sufficient to support DHS's BOP re flight risk

National Security & Danger

- Uncertainty as to ID can support danger/ nat'l security finding
- W/o knowing identity, cannot verify criminal record, background, country of origin

**STRANGER
DANGER**

Matter of D-J-, 23 I&N Dec. 572 (A.G. 2003)

- Facts:
 - Undocumented alien arrived with 200 others on boat from Haiti and DR
- A.G. Holding:
 - Alien should be detained; his release would encourage mass migration
 - Mass migration relevant to national security

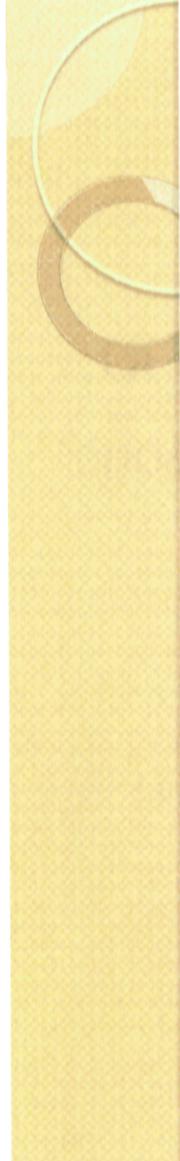


Attorney General's Reasoning

Mass Migration & Nat'l Security

- Such migrants typically undocumented, w/ no ID
- Difficult to ascertain true ID of interdicted persons in large groups
- Pakistanis using Haiti as staging ground

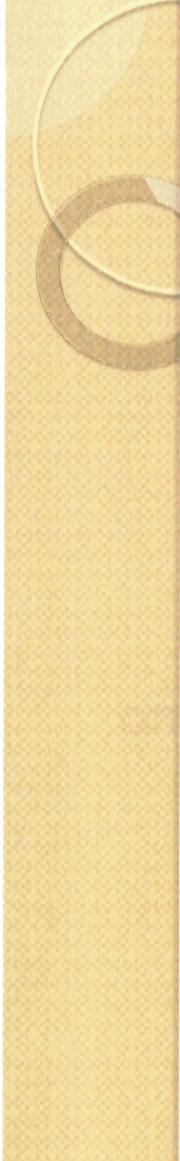




Attorney General's Reasoning

Mass Migration & Nat'l Security

- Gov't lacked resources to undertake exhaustive factual investigation re status of such a large group of undocumented aliens
- Created substantial risk of granting release to persons who present a threat to nat'l security



RILR v. Johnson,
80 F. Supp. 3d 164 (D.D.C. 2015)



- Facts: DHS detained a number of aliens following “surge”
- Discouraging mass migration per *Matter of D-J-*
- Ps argued categorical denial of bond was violation of due process



RILR v. Johnson

- Holding:
 - Granted preliminary injunction
- Reasoning:
 - Generalized deterrence not a valid basis for categorical denial of bond
 - Although mass migrations strain resources, no evidence of nat'l security risk



RILR v. Johnson

- Decision enjoins DHS from categorically denying bond based on mass migration w/o individualized determination
- Is *Matter of D-J-*'s reasoning salvageable to the extent it indicates that uncertainty as to ID is factor relevant to national security/danger?



Matter of Fatahi, 26 I&N 791 (BIA 2016)

- Facts:
 - Alien entered on falsified Syrian passport
 - Passport was blank and R's identifying info filled in by unauthorized person
 - Alien knew passport was falsified
 - Passport stolen from Syrian gov't by ISIS

Matter of Fatahi



- Holding:
 - Circumstantial evidence re R's use of passport sufficient to show danger/national security risk
 - Passport passed through hands of terrorist organization
 - Falsification of passport created issues as to R's true ID
- Note: Holding based on ID issues in combo w/ other factors, NOT ID alone

Due Process in Immigration Proceedings

- DP violation in immigration proceedings must involve deprivation of something guaranteed by Act or regs
- Some regs pertain to age, a component of ID
- 8 C.F.R. § 236.3 (release from detention)
 - “Juveniles” under 18 yr old must be released to individual who agrees to care for alien and ensure appearance at future proceedings





Singh v. Holder, 749 F.3d 622 (7th Cir. 2014)

Facts

- Conflicting evidence of ID presented
 - Multiple names and birth dates
- R detained in 1997
 - Contemporaneous I-213: 19 yrs old when detained
 - R insisted that he was 15 yrs old in 1997
 - Released to employer, not relative
 - No agreement executed under reg
- Since he was “juvenile” argued release to employer violated regs and thus DP

Singh v. Holder

Holding

- Given conflicting evidence regarding ID, R had not shown he was under 18 yr old when he was released in 1997
- Thus, R had not shown 236.3 or his right to Due Process was violated

Note: Although no party generally has BOP to establish ID, R has BOP re ID in MTR context



Summary

- Uncertainty as to ID, by itself, may support flight risk finding in 236(a) bond proceedings
- Not clear whether DHS can meet BOP re flight risk based on ID issues in prolonged detention context
- Uncertainty as to ID may support danger/nat'l security finding in combination w/ other factors
- Where DP claim involves age, it is alien's BOP to sufficiently establish ID, especially in MTR context



Questions